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BY JOHN L. WENDELL,

COUNSELLOR AT LAW.

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P R E F A C E

TO THE

SECOND AMERICAN EDITION.

BEFORE publishing this edition *all the cases* decided in the *English* and *American* courts on the subject of defamation, since the publication of the first American edition of this work, were carefully read and considered, and a note taken of every case containing *any thing new*, illustrative of principles previously settled, or calling in question or casting a doubt upon such principles. Amongst those of the former class are the cases of *Kelly v. Vartington*, 2 Nev. & M., 460 : 4 Barn. & Ald., 700 ; *Wright v. Woodgate*, 2 C. M. & R., 573 : 1 Tyr. & G., 12 ; *Padmore v. Lawrence*, 11 Adol. & Ellis, 380 ; *Todd v. Hawkins*, 8 Carr. & Payne, 888 : 2 M. & Rob., 20 ; and *Blackham v. Pugh*, 2 Mann. Gr. & Sc., 611 ; and of the latter class are *Fountain v. Boodle*, 3 Queen's B. R., 5 : 2 Gale & D., 455 ; and *Coxhead v. Richards*, 10 (English) Jurist, p. 984, anno 1846. All these cases are upon the subject of *privileged communications*, and will be found noted in Vol. II., p. 58, note (2). The two last named cases, and particularly that of *Coxhead v. Richards*, are very interesting, and have been supposed to unsettle the law on the subjects to which they relate ; but such supposition was erroneous, as is shown in the note. In this note an error has occurred by the substitution of the word *post* for *ante*, in the second paragraph, which the reader is requested to correct.

This edition contains a modification of the note to the case of *Van Ankin v. Westfall*, Vol. I., p. 21, note (1) ; and an addition to the note (a. a.), Vol. I., p. 88, denying the right of a defendant to show the *immateriality* of evidence charged by him to be false. To the same effect is note (1), Vol. I., p. 99. The decision in *Smith v. Ashley*, 11 Metcalf, 367, that the publisher of a newspaper is not liable for the publication of an article, the libellous character of which is unknown to him, is shown to be erroneous, Vol. II., p. 34, note (1), and in pages 252 and 258 there are notes referring to the code rendering unnecessary the allegation of *extrinsic facts* to give point to defamatory words ; and to decisions holding it necessary to a perfect defense in an action for a libel to show not only the *truth* of the allegations, but that the publication was made with *good motives* and for *justifiable ends*.

This edition relieves the profession from going over the cases for the last ten years, and in that respect at least is preferable to the former.

New York, 9 August, 1852.

INTRODUCTION.

BY THE EDITOR.

IN consequence of reiterated complaints during the last winter, by the conductors of numerous public journals, of alleged erroneous doctrines held by our courts in respect to the *Law of Libel*, the editor of this edition of Mr. Starkie's Treatise, was induced to look into the matter. He soon became satisfied that to obtain redress in the cases in which the decisions complained of had been made, it was only necessary that an appeal should have been prosecuted to the higher judicial tribunals, and that the application to the Legislature, proposed by the conductors of the press, to correct the supposed defects in the law, was unnecessary and inexpedient. He therefore contributed his mite to dissuade from legislative action, convinced that the rights of individuals, as well as the liberty of the press, were sufficiently protected by the existing law, correctly understood and wisely administered.

In his investigations upon this occasion, the editor was forcibly struck with the *diversitie* (to use the orthography of ancient days,) in the law of libel as recognized in England and as held here, notwithstanding

We, as well as England, profess to be governed by the common law ; and it occurred to him that the republication of an approved treatise on the subject, accompanied with notes inviting attention to the differences alluded to, could not fail to be interesting and instructive—and the result is the work now submitted to the profession.

In England, *giving the name of the author of an oral slander* at the time of its repetition, is a *perfect defence to an action*. Strange as it may seem, it is unquestionable, that at a period as late as 1830, when the last English edition of Mr. Starkie's 'Treatise was published, such was held to be the law in England. So it was held by Lord KENYON in 1796, by Lord ELLENBOROUGH in 1802, and even down to the present day there is no case to be found in the English Reports overruling the former decisions, though in 1829, Lord Chief Justice BEST did enter a *protestando* against the doctrine. With us, this doctrine has long since been exploded. (See note [1] *infra*, vol. I. p. 340).

So, in England, *suspicious* and *rumours* of the guilt of a party to whom crime is imputed, may be given in evidence *in mitigation of damages*, although the action be brought for the express purpose of vindicating the character of the party from the aspersions cast upon him, resting upon no more solid basis than suspicion and rumour. Here this doctrine also has long since been repudiated. If, indeed, suspicions and rumours have done their deadly work, and the *good character* of the party against whom they were directed is destroyed, our courts allow the *general bad character* of a plaintiff in an action of slander to be shewn *in mitigation of damages*, but evidence of mere rumours and suspicions is not permitted. (See note [1] *infra*, vol. II. p. 96.)

In England, the doctrine of *privileged communications* is a vital principle of the law of slander; whilst here it is scarcely known. In England, no man is punishable *criminally* for the publication of his opinions upon any subjects whatever, affecting the constitution of the country, its laws, or their administration, or the conduct of public functionaries in the discharge of duties entrusted to them, provided the communications are sincere and honest and not malicious—the character of the publication to be judged of by a *jury* and not by the *court*. Nor is he liable *civilly*, in an action for damages for any communication made by him affecting the character or the credit of another, though it be *false* or *erroneous*, provided it be made on an occasion in which his own interests or the interests or the business, or even the convenience of others require it to be made, and that he act in good faith, without malice—the *bona fides* being presumed, until the contrary is shown by proof. *Here* an action has been sustained against the chairman of a political meeting for permitting his name to be affixed to an address to the electors of the state, canvassing the conduct, qualifications and character of a *candidate for office*, who solicited their suffrages, although the address contained no charge, which if *orally* made would have been actionable, and no proof of *express* or *actual malice* was given; (see note [1] page 194 Vol. I. *infra*,); and so an action has been held to lie for words affecting the credit of a third person, although spoken in answer to an inquiry, on a subject in which the party making the inquiry had an interest, and no proof of *express malice* was given; but on the contrary was rebutted by the circumstances of the case. (See *Sewall v. Catlin*, 3 Wendell 291.)

In this country but little other effect is given to the

general issue in the action of slander, than to compel the plaintiff to prove the facts alleged in his declaration, essential in law to his right to recover ; whilst in England, the plea of the general issue is of such force, that under it the defendant, with the exception of the defence arising from a *justification of the charges made* and from the protection afforded by the *statute of limitations*, may avail himself of any defence existing to the action.* He may under it, prove that the words were not spoken or written in the calumnious sense alleged in the declaration ; that the occasion and circumstances of the speaking or writing were such as either *absolutely* to exonerate him from liability to an action without regard to the motive or intention with which the words were uttered or written ; or *conditionally*, that is, provided it be not proved that he was actuated by *express* or *actual malice*, as contra-distinguished from that malice which is *implied* from the falsity of the charge. In fine, as the plaintiff in an action of slander, like the plaintiff *in every other action on the case*, must depend on the equity and justice of his case for his recovery, so whatever will in equity and conscience prevent a recovery, *may*, with the exceptions above stated, *be given in evidence under the general issue*, and *need not be specially pleaded*. (See *infra* Vol. I. p. 455, note [1] ; p. 456, note [1] ; p. 325, note [1] ; and p. 208, note [1].)

The plea of the *general issue*, however, as before observed, will not avail in all cases. If the defendant intends to give evidence of the truth of the publication,

* Whether to the *two* defences which *must* be specially pleaded to render them available, should not be added a *third*, quere ? The defence referred to, is that set up by a party that the publication charged to be libellous, is a true and fair account of a *judicial* or *parliamentary* proceeding. Whether such defence must be *specially pleaded* is an unsettled question. (See note [1] *infra* vol. I. p. 456.)

he must interpose a *plea of justification*. This plea is usually put in where the defendant undertakes to prove the truth of the charge of a *crime* imputed to the plaintiff, as is manifest as well from adjudged cases as from the rules of pleading, requiring the same degree of certainty and precision in a plea of justification that is demanded in an indictment. This plea is proper, also, in all cases where *specific charges* other than crime have been made, affecting the plaintiff in his character, office, profession or business. Instead, however, of limiting its use to cases in which it may properly be interposed, matter has been alleged in the form of a plea or notice of justification, which *is not and in the nature of things cannot be, the subject of a plea of justification*, because not presenting on its face a full and perfect answer to the declaration : or, in other words, shewing a bar to a recovery ; and the consequence of this vicious mode of pleading and of the adjudications of the courts growing out of it, has been to involve the law of libel as it prevails in the state of New-York, in such doubt and uncertainty that by many, and especially those who have suffered from the errors of the courts, it was supposed that the only mode of restoring the good old common law was by legislative interference. The evils alluded to happen in this wise : A defendant in an action of slander joins with the plea of not guilty a *notice of justification* setting forth certain facts and circumstances which he intends to offer in evidence on the trial of the cause *in bar of a recovery*. The facts and circumstances thus stated may be fit and proper to be given in evidence under the general issue, and if not rebutted by proof of *express or actual malice*, may authorize a verdict for the defendant ; but on their face enough is not pre-

sented to raise a bar to a recovery. Again : the defendant pleads that the publication alleged to be libellous is a letter written by him in answer to an inquiry as to the character of the plaintiff as a *servant*. This would be a good and perfect defence to the action if not rebutted by proof of malice ; but the matter thus set up is not the proper subject of a special plea, because, to render the plea a full answer to the declaration, it would be necessary to negative *the existence of malice*, which cannot be done ; for if done, such averment would render the plea demurrable, as it would both *deny* that which the plaintiff would be bound to prove under the general issue, and would *confess* and *avoid*. Or the defendant sets forth in a notice of justification that the publication alleged to be libellous is a criticism upon a literary work, and that upon the trial of the cause he will produce in evidence the work criticised by him, and insist that the severity of remark complained of as libellous is fully warranted by the nature of the work reviewed, or the principles advocated by the author. The facts thus stated, if proved under the plea of the general issue, might constitute a good and perfect bar to a recovery, provided the defendant had not exceeded the bounds of fair criticism, and had not been actuated by malicious motives ; but they would not in themselves present a bar to a recovery. When a defendant who has interposed such plea or notice offers at the trial to verify the same by proof, he is met by the objection that the facts offered to be proved, *do not constitute a justification* ; and the judge sustains the objection, and rightly too. The defendant then offers to prove the truth of the facts *in mitigation of damages*, and the judge refuses to receive the evidence either on the ground that the de-

fendant having pleaded a justification and failed to verify his plea, is not entitled to give evidence in mitigation ; or that the facts tend to establish the truth of the charge, and therefore cannot be given in evidence under the general issue. Thus the evidence being rejected both in *justification* and in *mitigation* the defendant is cast a victim bound hand and foot on the altar of justice, and the jury hood-winked and in total ignorance of the occasion and circumstances of the speaking of the words or publishing of the libel, are required to pronounce a verdict, at the same time being instructed that the only questions for them to pass upon are: 1. Whether the defendant is the author or publisher of the slander, and 2. The amount of damages to be awarded to the plaintiff.

That these are not imaginary cases, will be seen by reference to the adjudications of the courts. *Turrill v. Dolloway*, 17 Wendell 426, was an action for a libel. The publication stated that the plaintiff, then a candidate for the office of member of Congress, did about 1st March, 1830, put his official signature as first judge of the county of Oswego, to a paper purporting to be an affidavit, certifying under his hand that the person who signed it was duly sworn, when in truth he was not sworn. It further represented that such paper was intended and used for the purpose of preventing the re-appointment of the then collector of the customs for the port of Oswego ; that the plaintiff had made himself, secretly as he supposed, busy in concerting measures to produce that result, and concluded with an appeal to the public in these words, " We leave the public to judge under the circumstances, whether Judge Turrill has not committed a gross violation of his oath of office, for the purpose of ruining

a man whom he has long endeavored to injure, although he belongs to the same political party with himself ?” The defendant pleaded the general issue, and accompanied the plea with a notice, that on the trial of the cause, he would prove that the plaintiff did affix his official signature as first judge of the county courts of Oswego, to a statement in writing purporting to be an affidavit, made by one Matthew McNair, certifying that McNair had been duly sworn to the truth of the facts set forth in the statement, when in fact he had not been sworn ; that the statement was intended and used for the purpose of preventing the re-appointment of John Grant, jun., then collector of the customs of the port of Oswego ; that the plaintiff at the time of so affixing his signature, and before and since made himself secretly busy in concerting measures to prevent the re-appointment of Grant, and had for a long time endeavored to injure Grant, although he belonged to the same political party with himself. That the plaintiff at the time, &c. was a candidate for the office of a member of congress, and that the publication was made to inform the electors of the congressional district of the facts detailed therein ; and that all the matters alleged in the declaration to be libellous, were true. The issue thus joined was brought to trial, and the defendant proved that a paper in the form of an affidavit was drawn up about 1st March, 1830, relating to some smuggling transaction which ought not to have escaped the vigilance of the collector of the customs at Oswego ; that McNair named in the paper as the deponent, showed it to the plaintiff who told him to sign it, which he did, and the plaintiff then put the *jurat* to it, and signed it officially as sworn to, although no oath was administered to McNair ;

and that the paper thus certified, was forwarded to Washington to be used in preventing the re-appointment of the collector. The circuit Judge instructed the jury that if the publication only charged the plaintiff with *inadvertence* or *mistake*, he would not be entitled to recover ; but if it charged *official corruption*, the defendant was bound to prove the plaintiff guilty of corruption, and proof of mistake or inadvertence, would in such case, be no justification. The jury found for the *defendant*, and a new trial was ordered by the Supreme Court, on the ground that the charge to the jury was erroneous. The judgment of the court was pronounced by BRONSON J. who *pronounced the publication to be libellous*, and said the judge *should have so instructed the jury*, and that there was no ground for leaving the question to the jury as one of mere mistake or inadvertence. The cause was tried a second time before the Hon. PHILO GRIDLEY one of the circuit judges. After proof of publication, the defendant offered to verify the facts and circumstances specified in the notice subjoined to the plea ; to the admission of which evidence the plaintiff objected, on the ground of the insufficiency of the notice, and that the facts stated in it did not amount to a justification of the charge ; which objection was sustained by the circuit judge, and the evidence rejected. The judge thereupon instructed the jury that the publication amounted to an unequivocal charge of official corruption ; that the *Supreme Court had determined* the paper to be *libellous* in its character, and it would be *their duty so to consider it* ; that the *only other point* necessary to be considered, was whether the defendant had been guilty of publishing the libel, and after some remarks on the subject of damages, submitted the case

to the jury, who found a verdict for the plaintiff with \$800 damages. The *defendant* now asked for a new trial, which was denied, the court holding that the notice *did not amount to a justification*, and that the cause had been tried in conformity to the principles laid down on the former motion. See 23 *Wendell*, 383 to 387. This case fully illustrates the consequences resulting from this vicious mode of pleading, and the adjudications of the courts growing out of it. The defendant published a hand-bill in reference to the conduct of the plaintiff, then a candidate for an elective office, stating certain facts and appealing to the public to judge under the circumstances, whether the plaintiff had not committed a gross violation of his oath of office. If the facts were as stated in the publication, the defendant had an unquestionable right to publish them, for no man is liable in a civil action for speaking or printing the truth. (See *infra*. vol. I. p. 235, note [1] ; p. 233, note [1].) The only question was as to that portion of the publication in which the appeal is made. On the part of the plaintiff it might have been said that it was equivalent to a distinct and substantive charge of official misconduct ; whilst on the part of the defendant it might have been insisted that the appeal was a mere inference from or commentary upon the facts before stated, and whether the one or the other, was a proper question to submit to the jury. These, it will be perceived, were *questions of fact* to be determined by the jury, and not *questions of law*, to be decided by the court ; and to enable the jury to pass upon them understandingly, it was indispensable that they should know the facts of the case ; that they should know whether the plaintiff did affix a *jurat* to a paper purporting to be an affidavit not sworn to ; the

use to which the pretended affidavit was put ; and the state of feeling of the plaintiff towards the defendant, whether inimical or otherwise. Without such evidence the jury could not pass upon the questions, and therefore every principle of justice demanded that the defendant should have the benefit of the testimony. How, then, were the facts, to be brought before the jury ? They could not be set up *in bar* in a *plea* or *notice of justification*, for they did not in themselves constitute a bar ; they merely presented a case which might or might not be pronounced a good defence by a jury ; and the only mode of bringing the evidence to the knowledge of the jury was to adduce it under the general issue. The judge, therefore, rightly decided that the facts set forth in the notice did not amount to a *justification* ; but he should have received the evidence so as to enable the jury to pass upon the question whether the defendant was warranted in making the appeal to the public, which had been made by him to determine under the circumstances of the case, whether the plaintiff had not been guilty of a violation of his oath of office. And in case they should find against the defendant upon that question, then to give such consideration to the testimony as in their judgment it was entitled to, in assessing the damages to be awarded to the plaintiff. In either point of view the testimony was most important (see *infra* vol. I. p. 314, note [1] ; and yet it was wholly excluded. The judgment of the supreme court in this case was reversed in the court for the correction of errors. See 26 *Wendell* 383. No resolution was adopted expressing the grounds of the reversal ; but from the opinions delivered, it is presumable that the judgment was reversed, because the case had not been so submitted as to en-

able the *jury* instead of the *court*, to pass upon the question of the defendant's liability.

The case of *Cooper v. Barber*, 24 Wendell 105, was an action for a libel alleged to have been published by the defendant, the editor of a newspaper called the OTSEGO REPUBLICAN. The libel commences in these words: "FROM THE CHENANGO TELEGRAPH, *J. Fenimore Cooper*. This gentleman (meaning the said plaintiff,) not satisfied with having drawn down upon his head universal contempt from abroad, (meaning Europe,) has done the same thing for himself at Cooperstown, where he resides;" and then proceeds to give an account of a controversy, which had arisen between the plaintiff and certain citizens of Cooperstown, relative to a tongue of land projecting into Otsego Lake, called *Three Mile Point*: stating in substance that the citizens of Cooperstown had always been in the habit of visiting the point during the summer months for recreation and pleasure; and that latterly the plaintiff had forbidden resort to it under pain of prosecution; that the citizens had a meeting; that speeches were made and resolutions passed that they would continue to visit the point, and bidding defiance to the plaintiff. Then followed comments, not of a very courteous character, but still not so offensive as to induce the plaintiff to make them a particular subject of complaint in the points presented on the argument of the case; the principal grievance pointed out being the first paragraph, referring to his character abroad. Then succeeded the remarks of the defendant, setting forth the grounds of the claim of the villagers, to visit the point, containing nothing libellous, unless a professed desire to prevent 'a universal prejudice which appeared to be springing up against the

plaintiff,' may be deemed ironical, and therefore slanderous. The defendant pleaded the general issue, and subjoined a notice that on the trial of the cause, he would prove (*inter alia*) that the inhabitants of Cooperstown had, for a number of years, been in the habit of visiting the point for recreation and pleasure without objection, until the appearance of the plaintiff's notice forbidding them to do so ; that they had erected a house on the point, and taken care of it and of the trees and shrubbery, and were in the daily occupation of it with the knowledge and consent of the owners ; that it was generally understood that the father of the plaintiff, former owner of the point, gave permission to the inhabitants to use, occupy and enjoy it, and that it was his intention, and of those claiming title under him, except the plaintiff, that they should continue to do so without molestation. After proof of the publication, the judge remarked that he was satisfied that the matters set forth in the defendant's notice *did not amount to a justification*, and that they were *irrelevant* ; and that he would, without waiting for an application for that purpose, exclude evidence of those matters. The defendant's counsel then offered to prove the facts set forth in the notice *in mitigation of damages*, but the judge decided that the evidence was inadmissible for that purpose also. Subsequently the defendant by his counsel, offered to prove that every fact stated by him in his comments was true ; but the judge refused to receive the testimony. The jury found for the plaintiff with \$400 damages. The defendant applied for a new trial, which was refused. BRONSON, J. who delivered the judgment of the court, concurred with the Circuit Judge that the facts set forth in the notice *did not amount to a justification*,

and held that evidence of such facts was *inadmissible as a bar to the action*, because the justification was not so broad as the imputation upon the plaintiff's character; and was *not proper evidence in mitigation of damages*, for the reason that so far as it went, it tended to prove the charge well founded. Here again it will be observed that the defendant attempted to plead in bar of a recovery, matter which was not the subject of a plea of justification, indeed had no pretence to it, and yet, it was solemnly decided because *the justification* (as it was called,) was not so broad as the imputation upon the plaintiff's character, the evidence was inadmissible; and it was also held that the evidence was *not proper in mitigation*, for the reason that so far as it went, it tended to prove the charge well founded; although it had been decided that the facts set forth in the notice did not amount to a justification—and therefore there could be no danger of the jury being improperly influenced and induced to render a verdict for the defendant, who admitted that there must be a verdict *against him*, and only asked that the occasion and circumstances under which the publication was made, might be taken into consideration *in mitigation of damages*. If the views which have already been advanced in reference to the questions proper to be submitted to a jury in actions for libels founded on publications of this character be correct, instead of the disposition which was made of this case, a new trial would have been granted, with directions that the evidence offered should be received, so that the question might be submitted to the jury, whether the comments of the editor of the Telegraph republished by the defendant, were or were not warranted by the facts of the case; and if they should

find that they were unauthorized, then that the facts might be taken into consideration in assessing the damages to be paid by the defendant ; for it might have happened, had the facts been given in evidence, that the jury would not have felt it their duty to render a verdict of \$400 in favor of the plaintiff.

A third case illustrating the injurious consequences of this vicious mode of pleading, and of the erroneous decisions growing out of it, is that of *Cooper v. Weed, Hoffman and White*, tried at the Otsego Circuit in September, 1842, before the Hon. Philo Gridley, one of the circuit judges (MSS.) This was an action for two separate libels, published in the *Evening Journal*, a newspaper printed in Albany, of which Weed was the editor, and the other defendants, were the proprietors. They were republications : the first of an article from a public journal called "The New World," and the second of an article from "The Buffalo Commercial Advertiser." The *first* article spoke of a libel suit prosecuted by Cooper against Weed in which an inquest by default had been taken, the defendant not appearing at the trial, and the damages of the plaintiff being assessed at \$400. It was said that the cause of the non-appearance of the defendant at the trial was the serious indisposition of his wife, and the dangerous illness of his daughter ; that the fact of the sickness of his family was stated to the judge, who refused to interfere, and that then an appeal was made to the plaintiff, by the counsel of the defendant, "but," it was said, "he might as well have appealed to the reddest of the great novelist's Indians, when the war paint was on him, and the scalps of the pale faces hung reeking at his belt." The *second* article was headed "**J. Fenimore Cooper**," and commences thus :

“ We have never joined in the cry against this gentleman. He has written some very foolish things ; has shown bad temper and worse taste ; has made himself ridiculous by setting up as the arbiter of the conventionalities of social life ; more than all, has been guilty of the folly of decrying and defying the whole newspaper press of the country, and prosecuting sundry prominent gentlemen connected with it for the offence of severely criticising some of his late literary productions.” Another paragraph in this article was in these words : “ But the worst enemy of Mr. Cooper could not wish him in a more discreditable position than the one in which he is now placed by his own act, if the following from the *Courier and Enquirer* is true : “ Mr. C. has exhibited a want of manhood and feeling alike disgraceful to him as a man and gentleman ! ” The defendants pleaded the general issue and subjoined to it *a notice of justification*, setting forth matter which they would prove on the trial, and insist upon *in bar of a recovery* : As to the first libel, that they would prove that at the time the inquest was taken, the wife of Mr. Weed was sick and his daughter dangerously ill, and that on that account he did not attend and defend the cause ; that the reason of his absence was stated to the circuit judge, and he declining to interfere an appeal was made to the humanity of the plaintiff to whom the facts were stated, but that he refused to allow the cause to be delayed, and took an inquest by default. As to the second libel, the defendants gave notice that they would prove that the plaintiff wrote and published a book entitled “ *Home as Found*,” in and by which he had shown bad temper and worse taste ; had made himself ridiculous by setting up as the arbiter of the conventionalities of social

life, and had been guilty of the folly of decrying the whole newspaper press of the country ; that he had prosecuted two individuals, viz : James Watson Webb and Thurlow Weed, prominent men connected with the newspaper press of the country, for the offence of too severely criticising some of his late literary productions, to wit, "Home as Found," and had caused one of them to be indicted for the same supposed offence ; that the matters intended to be proved in justification of the first libel would also be given in evidence in justification of the second, and thus it would be insisted that the plaintiff had placed himself in a position as discreditable as his worst enemy could wish. On the trial of the cause, after proof of publication of the alleged libels, the defendants offered evidence to verify the facts set forth in the notice of justification as to the libel contained in the first count of the declaration, which evidence was objected to as inadmissible by the counsel for the plaintiff, on the ground that it would not, if admitted, amount to a justification of the libel ; the counsel insisting that the concluding sentence of the first libel was a distinct and substantive charge of inhumanity. The counsel for the defendants contended that the paragraph alluded to was a mere inference from, or commentary upon the facts before stated, and that it was the province of the jury to determine whether it was the one or the other, and that if they should come to the conclusion that it was a mere inference or commentary, then to say whether it was or was not a *fair* inference or commentary. The judge decided the publication to be libellous, and held the evidence inadmissible, inasmuch as the facts offered to be proved *did not* of themselves, and without any additional or explanatory facts, con-

stitute a justification of the libel upon any construction of which it was susceptible. He observed that he thought that upon a true reading of the libel, it asserted that the appeal to Mr. Cooper for a postponement of the trial, was unsuccessful because he was a man of great inhumanity, &c., thus assigning his inhumanity as the cause of his refusal to postpone the trial; but if the true construction was that the appeal to Mr. Cooper was unsuccessful, and therefore he was a man of great inhumanity of disposition, &c., thus making the charge an inference from or commentary upon the facts stated, it was still necessary to *plead and prove* such a state of facts *as would justify the charge*, for if the commentary was *unfair* and not warranted by the facts, and was libellous in its character, it became the foundation of an action of itself, and required a justification as broad as the charge; and that applying that rule to the case at bar, the facts stated in the notice and offered to be proved without an explanation why an affidavit was not produced to show the sickness of Mr. Weed's family, or of any other facts whatever, clearly fell short of justifying the grave charge contained in the libel. The counsel for the defendants next offered to prove the truth of the charges made in the publication set forth in the second count, and accordingly produced the book entitled "*Home as Found*," of which the plaintiff acknowledged himself to be the author, and offered to read certain portions of it in proof of such charges, which the judge would not permit, on the ground that the notice was insufficient in *not specifying* the particular portions of the work relied on to *justify the several and distinct charges* attempted to be justified, and that a *general reference* to a book of 500 pages was not

enough for such purpose. When the evidence was closed the counsel for the defendant proposed to argue to the jury the question whether the concluding paragraph of the publication set forth in the first count of the declaration, was a distinct charge of inhumanity, or a mere inference from or commentary upon the facts before stated; but the judge ruled that he would not allow it to be argued to the jury, that the publication set forth in the first count of the declaration was not libellous; that it was to be taken as settled for the purposes of that trial, that the *publication was libellous*, and that there was *no justification*. He however told the counsel that the attention of the jury might be called to any mitigating circumstances appearing on the face of the publication. The judge then, after the cause had been summed up by counsel, charged the jury that it had been *decided by the court* that the action was sustained, and that *the libel was not justified*; and that *the only question* for them to pass upon was the amount of damages, and that in making up their opinions in that respect, they should regard the facts legally before them as evidence and none other. The jury found a verdict for the plaintiff with \$200 damages.

Here again are seen the pernicious consequences of an attempt to present in a plea or notice of justification matter of defence not the subject of a plea of justification. Matter constituting the proper subject of such a plea must on its face, be a complete and perfect bar to a recovery. Now it is palpable that neither branch of the notice of justification in this case presents a bar. As to the first libel, the defendants insist that they had a lawful right to charge the plaintiff with inhumanity under the existing circumstances: Mr. Weed's

wife was sick, and his daughter dangerously ill, and he could not tear himself from his attendance upon them, and proceed to the circuit to make his defence. His counsel appealed to the plaintiff to permit the cause to pass ; but he inhumanly refused. It is not alleged that the plaintiff knew, or that proof was offered to him, that the representations as to the sickness in Mr. Weed's family were true ; and without such fact brought home to his knowledge, there was no pretence for the charge of inhumanity, as it is called, for it is not usual for parties conducting angry suits of this nature, to subject themselves to much inconvenience for the accommodation of their adversaries, upon a *mere suggestion* of sickness in the family of one or the other. Had it however been alleged in the *notice*, that due proof of the sickness in Mr. Weed's family had been presented at the time when a postponement of the trial was asked, still enough would not have been averred to have authorized the judge to pronounce the facts sufficient to constitute a justification. The matter set forth in the notice proved under the general issue might have authorized the defendants to demand that the question should be submitted to the jury whether the paragraph complained of as libellous was or was not a fair inference from, or commentary upon the facts before stated ; but they could not contend with any show of reason that the facts themselves amounted to a justification. Had the circuit judge therefore decided that the defence set up was not the subject of a plea or notice of justification, his decision would have been right ; but unfortunately in this case, as in the cases before cited, and others that might be specified, it was held that the defence set up was the proper subject of a plea of justification, but that

enough was not averred to establish a justification ; the judge intimating what he subsequently more fully expressed, that the making of an affidavit of the sickness of Mr. Weed's family, and the presentment of the same to the plaintiff should have been averred in the notice—whereas had those facts been averred, the notice still would have fallen short of shewing a case of justification. But though the facts offered to be proved did not amount to a justification, they were admissible in evidence under the general issue, and the defendants should have been permitted to prove them, to show the occasion and circumstances under which the last paragraph in the first alleged libel was written. It may well be doubted whether that paragraph contain any thing that is libellous ; there is in it no accusation of crime ; and in connection with the facts upon which it is based, there is nothing which can have the slightest tendency to expose the plaintiff to *hatred*, *contempt* and *ignominy*, the gravamen alleged in the declaration ; but admitting it to be libellous, the evidence should have been received to enable the jury to pass upon the question raised by the plaintiff's counsel, viz : whether the paragraph constituted a distinct and substantive charge, or was a mere inference from, or commentary upon the facts before stated. If they found it to be an inference or commentary, then to decide whether it was a fair inference or commentary ; and if they found it to be a distinct and substantive charge, or that the inference was unfair, then to give such consideration to the testimony in the assessment of damages, as it was entitled to. Instead, however, of receiving the evidence, and thus submitting the case to the jury, the judge himself decided that the paragraph contained a distinct and substantive charge of inhu-

manity ; that the facts offered to be proved fell short of establishing a justification ; that he would not permit the defendant's counsel to address the jury on the question, whether the paragraph amounted to a substantive charge, or a mere inference from preceding facts ; and finally told the jury that it had been decided by the court that the *action was sustained*, that the *libel was not justified*, and that *the only question for them to pass upon* was the amount of damages. It is worthy of remark that the principle insisted upon here as applicable to actions of slander of this character, brought for the publication of matter which *may* or *may not* be libellous, according to the finding of a jury upon a previous question of fact, presented itself in a shadowy form on the trial of this cause to the mental vision of the learned judge, but not with its consequences so fully developed as to induce him to adopt it as the rule to govern the case.

'The ruling of the judge in reference to the evidence offered to prove the second branch of the notice of justification, also requires some notice. "Home as Found," a book written and published by the plaintiff, was offered in evidence to prove that the plaintiff had written a great many foolish things ; had shown bad temper and worse taste ; had made himself ridiculous by setting up as the arbiter of the conventionalities of social life, and had defied and decried the whole newspaper press. The book was rejected by the judge on the ground that the notice was insufficient, in not specifying the particular portions of the work relied on to justify the several and distinct charges made in the publication, and that a *general reference* to a book of five hundred pages was not enough. Here, again, it will be observed that the defence attempted to be es-

tablished was viewed by the judge as *matter of justification* ; and because *the notice of justification* was not sufficiently definite, or in other words, had not that precision and certainty required in a *plea or notice of justification*, the evidence offered was rejected. Here, also, had the judge held that the defence set up was not the subject of a *plea of justification*, he would have decided correctly ; but instead of doing so, he held as he had done in relation to the first branch of the notice, that it was *the proper subject* of a plea of justification, but that enough had not been averred to make out a case of justification. Had the specifications of the portions of the work relied upon as authorizing the charges made against the plaintiff, been ever so precise and certain, the judge would still have been right in holding that the notice did not on its face raise a bar to a recovery, as it would not show a case of justification ; but he erred in refusing to admit the testimony, as the defendants had the right to insist that the publication alleged to be libellous was a fair criticism upon “ Home as Found,” and that the question whether it was so or not, should be submitted to a jury.

It sometimes happens that a publication alleged to be a criticism upon a literary production, is in fact a personal and defamatory attack upon the author as a *man*, and not upon the *author as connected with the work* assumed to be criticised ; in such case, the critic loses the protection which he would otherwise enjoy ; but whether he has abused the privilege of a critic is a *question of fact* to be determined by a jury, and not a *question of law* to be decided by the court. Where a defendant, regardless of the rule which Sir Edward Coke, in his reports termed ‘ an excellent point of

learning in actions of slander,' "not to demur although your opinion is that the plaintiff has no cause of action, but first take advantage of matters of fact, and leave matters of law which always arise upon the matters of fact, *ad ultimum*," interposes a demurrer in an action of slander, as was done in the case of *Cooper v. Stone*, 24 Wendell, 434; the court may legitimately say whether the matter alleged to be libellous is or is not *the subject of an action*; but when the party puts himself upon the country, even that case admits that the question whether a publication be or be not a fair criticism can be settled *only by a jury*.* In the case of *Cooper v. Weed and others*, the defendants had put themselves upon the country. The evidence, therefore, should have been received, and the defendants permitted to read to the jury such portions of the book as in their judgment authorized the publication complained of as libellous. As the question to be submitted to the

* The case of *Cooper v. Stone* was correctly decided, but it is respectfully suggested, not for the true reason. The learned judge who delivered the judgment of the court, assumes that the demurrer admits that the defendant under the pretext of criticism, had calumniated the plaintiff. "The difficulty," says the judge, "of sustaining this demurrer, lies in its admitting that the plaintiff's moral character had been falsely and maliciously assailed." The defendant, and no doubt the learned pleader who interposed the demurrer, must have been greatly surprised by this annunciation, for it is not to be presumed that such an admission was the object of the demurrer; and yet, as before observed, the demurrer was properly over-ruled. It was manifest from the paper books, that the plaintiff meant to insist that under the pretext of criticism the defendants had maliciously slandered him, and he had an undoubted right to bring his action and submit the question to a jury, whether the publication was a fair criticism, or a libel under the pretext of a criticism. The publication contained matter which *might or might not* be libellous, according as a jury should find upon the question whether the publication was or was not a fair criticism; and that was a question of fact to be determined by a jury, and upon which the court had no right to pass—indeed, could not understandingly pass, without an examination of the work alleged to have been criticised: in doing which they would depart from their appropriate duties as a court, and invade the province of the jury. As, therefore, enough appeared to entitle the plaintiff to claim that his case should be submitted to a jury, the only proper course was to over rule the demurrer and send the parties down to trial at the circuit.

jury upon this part of the case, was as to the *fairness* of the criticism, how could they pass upon it, unless the subject of the alleged criticism was submitted to them ? and in case they should find that the criticism was *unfair* how could they understandingly assess the damages, without seeing the work which had been criticised ? for, though they might find for the plaintiff, they might consider the extenuating circumstances such as to require but a nominal verdict.

If the defendant fail in establishing a justification, or in shewing that he is *protected from legal liability* by the occasion and circumstances under which the words were spoken or libel published, he may then adduce such evidence as may be in his power in mitigation of damages. The rule on this subject, as laid down in *Knobell v. Fuller*, *infra* vol. II, p. 96, note *p*, and Peake's Ev. (by Norris,) *App.* xxxii, is: that in an action of slander, a defendant may, in mitigation of damages, give any evidence *short of such as would be a complete defence to the action if specially pleaded*. It is true, that both in England and here, objections have been made to this rule. It has been said, that to allow evidence of particular facts to be adduced tending to show that the plaintiff was really guilty of the charge imputed to him, would be to overturn the rule laid down in *Underwood v. Parkes*, 2 Str. 1200, viz: that the truth of the imputation should not be given in evidence under the general issue even in mitigation of damages ; and it has been asked if the rule of *Knobell v. Fuller* was adopted, how would it be possible to draw the line, and to restrain the evidence of *facts tending to throw suspicion* on the plaintiff within such limits that it should not produce actual conviction on the minds of the jury ; and it has also been said that

the practice would be attended with all the hardship and inconvenience which would result from admitting a complete justification under the general issue, for the plaintiff would be equally liable to *surprise*, and as little able to meet the charge in the one case as the other. So much of the rule of *Knobell v. Fuller*, as permits the giving in evidence of facts tending to throw suspicion upon the plaintiff; (and such probably is its sound construction, for it is the practice of the courts in England to receive such evidence,) it is conceded is indefensible; (See note [1], vol. II. p. 96, *infra*); but in respect to the remainder of the rule, it is submitted there is no force in the objection. The objection assumes that no facts can be proved in *mitigation of damages* but those of which the plaintiff has been apprised previous to the trial of the cause, whereas in the action of slander it is not necessary (as has been before shewn) to *plead specially* the matter relied upon in defence, except when the defendant intends to insist upon a *justification* or the *statute of limitations*; and consequently any evidence which goes to shew that in equity and good conscience the plaintiff is not entitled to recover is admissible under the general issue. Formerly the truth of the words was given in evidence under the general issue *in mitigation of damages*, but the resolution of the judges in *Underwood v. Parkes*, put an end to that practice, and now the truth of the words cannot be given in evidence unless the facts relied upon are specially pleaded in justification, and the matter set up in the plea of course must present *a bar to the action*, or the plea will be adjudged ill.

Besides: the point of the objection to the rule of *Knobell v. Fuller* is, that if the evidence permitted by

it be received, the rule of *Underwood v. Parkes*, will be overturned. The latter rule excludes only facts *tending to show the truth* of the charge imputed, and has no applicability to facts offered *in mitigation*, when all idea of justification is abandoned. The defendant therefore may in mitigation of damages adduce any evidence short of what would be a complete defence to the action *if specially pleaded*, for the purpose of enlightening the jury, and enabling them understandingly to pronounce upon the *quo animo* the publication was made, and to fix the amount of damages which the plaintiff ought to recover. Here again, a lion has been found in the way. It has been said that if a defendant in an action of slander interpose a plea of justification and fail in its proof, that he shall not be allowed to give any evidence in mitigation, other than as to the *bad character* of the plaintiff; that the penalty of failing to prove a plea of justification, is to deprive the defendant of the right of adducing such evidence in mitigation of damages under the general issue, as would have been admissible under that plea, had not a plea of justification accompanied it. This is denied to be law. "*Nihil quod est contra rationem est licitum*," says SIR EDWARD COKE, "for reason," he adds, "is the life of the law; nay the common law itself is nothing else but reason." The defendant is expressly authorized by statute, to join the plea of the general issue with a special plea of justification; and it cannot be that the failure to prove one plea deprives him of the benefit of the other. It has also been said that the placing upon the record a plea of justification which the defendant fails to prove, shall, as evidence of malice, enhance the damages. Without stopping to controvert the soundness of this last proposition, which

it is supposed might readily be done, and conceding it to be evidence of malice, it is sufficient to observe that nothing more can be claimed for it than the effect to which it is entitled as evidence in *aggravation*; and if so, no principle is better settled than that evidence in aggravation may be met by evidence in *mitigation*.*

There is no rule of law which forbids a defendant in an action of slander, who has pleaded a justification and failed to prove it, from turning round and offering in *mitigation of damages* evidence which neither proves the truth of the charge imputed to the plaintiff, or has a tendency to do so; there are *dicta* requiring such evidence, under such circumstances, to be rejected, but there is *only one decision*, and that in a *nisi prius* case, which has been over-ruled by two other *nisi prius* cases, and is at war with the first principles of the law of slander and the rules of pleading. (See *infra* vol. II. p. 97, note [2].) Every principle of justice requires the admission of such evidence. Suppose a defendant undertakes to justify a charge of *robbery*, and it turns out in evidence that the plaintiff *attempted* to commit a robbery but was interrupted in its execution, so that, technically, a robbery was not committed—can it be doubted but that evidence of the attempt

* In 1818 it was held by the supreme court of Massachusetts in the case of *Johnson v. Stetson and wife*, 15 Mass. R. 48, that a *plea of justification* accompanying the *general issue*, was proof of the speaking of the words; and it was further held that such plea of justification if the defendant failed to establish it by proof, was evidence of malice. The first proposition was reiterated by the same court in 1822, in the case of *Alderman v. French*, 1 Pick. 1. The rules thus laid down being considered a departure from the common law, the legislature of that state in 1826, passed an act declaring that a *plea of justification* should not be taken as evidence of the speaking of the words, nor should such plea, if the defendant failed to establish it, be of itself proof of *malice*; but that the jury should decide upon the whole case whether the special plea was or was not put in with a malicious intent. See 5 Pick. 299.

to rob would be admissible in mitigation, notwithstanding the failure to justify. Again: Suppose the plaintiff charged with having stolen the horse of A. on a certain day and at a designated place, and the defendant should plead or give notice that he would prove the truth of the charge; and it should be proved that the plaintiff on the day and at the place specified did steal a *cow*, (but not a *horse*,) the property of A. Here, also, the defendant would fail in verifying his plea, and a verdict would be rendered against him; for it is a settled rule of law applicable to this action, that he who would justify *a charge of felony*, must justify as to the specific charge laid, and cannot set up a charge even of the same crime, if distinct as to the subject matter; but can there be a doubt that the evidence of the *felony* perpetrated is admissible *in mitigation of damages*? Unless it was received, the defendant might be saddled with a heavy verdict; and if admitted, no jury could be found who would give a verdict for more than a nominal sum.*

The only objection to the evidence that can be imagined in the cases supposed, is that it might lead to *surprise*; which would be unanswerable were the matter offered in evidence such, that it could be pleaded in bar, for then it could not be given in evidence *in mitigation of damages*, under the general issue. The evidence offered in the cases supposed, could not be pleaded in bar, and yet the ends of justice would imperatively demand that the defendant should have the benefit of it on the trial of the cause, so that the jury might be properly guided in fixing the amount of the

* The case of *Andrews v. Vanduzer*, 11 Johns. R. 38, is a striking instance of the effect of refusing *evidence in mitigation*, after the failure of the defendant to verify a plea of justification.

recovery. In reference to *evidence in mitigation*, the objection of *surprise* does not lie, and accordingly in actions for criminal conversation, and for seduction, particular acts of vice and immorality on the part of either the plaintiff or his wife in the first action, or of the party seduced in the second, are received without objection under the plea of *not guilty*. Evidence of the bad character of the plaintiff is admissible in mitigation of damages, because a man of blemished reputation is not entitled to that measure of damages which would be awarded to a party whose character is untarnished. This it is supposed settles the principle of evidence in mitigation. Whatever will have a legitimate tendency to reduce the damages is admissible in evidence in mitigation. It has, however, been said that evidence only of *general character*, and not of *particular facts*, affecting the character of the plaintiff, is admissible; the reason assigned being, that though a plaintiff may be presumed ready at all times to sustain his character by proof, the same presumption cannot be made as to every act of his life. This reason would exclude all evidence of particular facts, the object of which is the reduction of damages, and is manifestly unsound as it comes in conflict with the general rule in relation to the admission of evidence in mitigation, viz: that a defendant may give *any evidence* for that purpose *short of what would be a complete defence, if specially pleaded*. It belongs to the rule of evidence impeaching the character of a witness for truth, but has no applicability to evidence impeaching the character of a plaintiff.

The author of the following treatise holds the doctrine, notwithstanding the provisions of the act of 32 Geo. III. c. 60, that on the trial of an issue upon an

indictment for a libel, the question whether the matter published *amounts to a libel*, still belongs to the court, and not to the jury ; in other words, that it is a mere question of law. Differing with him in the construction of that statute, and inasmuch as the act of the legislature of the state of New York, of 1805, *concerning libels*, was passed in conformity with the principles of the act of 32 Geo. III. ch. 60, upon the occasion of the assertion here, of the principles which had been advanced in England, and led to the passage of the English act, it is ventured to make a few remarks expressing such dissent, as would be the source of the deepest mortification to the editor, to give cause of suspicion, by his silence, that he acquiesced in the views of the author on this subject.

The act of 32 Geo. III. ch. 60, was passed in 1792, in consequence of doctrines held by the Court of King's Bench on the subject of the law of libel, which were deemed by the Parliament of England an innovation upon the law of the land ; oppressive and unjust to individuals ; and destructive of the liberty of the press. The judges, in *criminal trials for libel*, when there were no facts or circumstances proving justification or excuse in point of law, *directed the jury to find the defendant guilty*, if they were satisfied as to the *fact of publication*, and the *truth of the innuendoes*, without passing upon the question of whether the *publication was or was not a libel*, but leaving it to be determined by the court as a question of law. The act of 32 Geo. III. was accordingly passed, whereby it was *declared and enacted*, that a jury might give a *general verdict* of guilty or not guilty upon the whole matter put in issue, upon the trial of an indictment or information, and *should not be required or directed* by

the court or judges before whom the trial was had, *to find the defendant guilty* merely on the proof of the *publication* by the defendant of the paper charged to be a libel and *of the sense ascribed to it* in the indictment or information. The doctrine of the King's Bench intended to be corrected by this act, was asserted and applied in the State of New York on the trial of the indictment in the case of *The People v. Crosswell* in July, 1803, for an alleged libel upon THOMAS JEFFERSON; and the Supreme Court being equally divided in opinion upon the question, (the court temporarily being composed of but four judges,) an act was passed in 1805, substantially like that of 32 Geo. III. ch. 60, but broader in its terms; as it not only, like that act, declares the right of the jury to find a general verdict, and forbids a direction to convict the defendant merely on the proof of the publication of the matter charged to be libellous and of the sense ascribed to it in the indictment, but declares and enacts that on the trial of every indictment for a libel, *the jury* who shall try the same, *shall have a right to determine the law and the fact*, under the direction of the court, in like manner as in other criminal cases. *Mr. Starkie* insists that the principal object of the act of 32 Geo. III., was to remove the anomalies and peculiarities by which trials for libels were distinguished from those for other offences, and that the legislature meant to leave the question *whether the matter published amounted to a libel*, as before, *a question of law*; and it is undeniable that he is supported in this construction of the statute by the opinion of the Court of King's Bench, in the prosecution for a libel of *Sir Francis Burdett*: the judge presiding at the trial of that case having charged the jury that *they must take the law*

from him as to whether the publication was or was not a libel—in which he was sustained by the whole court, who held that such was the correct mode of leaving the question to the jury under the act of 32 Geo. III. This decision was made in 1830. In 1840, however, in the case of *Bailis v. Lawrence*, 11 Adoph. and Ellis 920, that act received a construction more in consonance with the intention of the law-makers, as expressed upon its face, and as evidenced by the history of its enactment. In *Bailis v. Lawrence*, it was held by Lord DENMAN, C. J., and his opinion was concurred in by the other judges, that the object of the act of 32 George III. was to *declare the law of libel in criminal cases to be the same as it was in civil cases*; that the act was applicable only to *criminal cases*, but it was a declaratory act, and the importance of declaring the law existed only in the case of criminal libels. In civil cases a jury never were *required* to find a verdict against the defendant in an action for a libel, upon the mere proof of the publication and of the truth of the innuendoes; and if the object of the act, as asserted in *Bailis v. Lawrence*, was to declare the law of libel in criminal cases to be the same as it was in civil cases, it necessarily follows that the view taken of the act in the case against *Sir Francis Burdett*, viz: that the legislature meant to leave the question whether the matter published amounted to a libel as before, a *question of law*, must be erroneous. If the King's Bench, in *Bailis v. Lawrence*, were right in the construction put upon the act of 32 George III., there can be no doubt that in the state of New York, no court or judge, under the act of 1805, has the power to *require* or *direct a jury* to find a defendant on a prosecution for a libel, guilty, merely on the proof of

the publication by the defendant of the paper charged to be a libel, and of the sense ascribed to it in the indictment ; or to instruct them that *they must take the law from the court or judge*, as to whether the publication is or is not a libel ; for here, by an express enactment of the statute, it is declared, that the *jury shall have the right to determine the law and the fact*.

It is, however, of less consequence to enquire what is the law in reference to *criminal cases* for libels, than to ascertain what it is in respect to civil cases. State Prosecutions for libels, hitherto have been rare in this country, and from the nature of our political institutions necessarily will be so for the future. The citizens of a country boasting to be free, will not and should not endure to have the liberty of speech and of the press restrained or controlled by public prosecutions. Error of opinion, said Jefferson, may be safely tolerated where reason is left free to combat it ; and when public opinion shall become so corrupt or besotted as not to be influenced by reason, the reform to be obtained by the lash of the law will be of small avail. Public prosecutions for individual wrongs may occasionally occur, but they also must be rare, or the public voice will be heard denouncing the prosecutor who attempts to enforce the penalty of fine and imprisonment for personal defamation, when complete satisfaction in damages may be obtained in a civil action. The statutes concerning libels in England and here, and the decisions under the former, have been adverted to, more for the purpose of deducing principles bearing upon civil cases or private actions, than to show what is the law in criminal cases. In *Baylis v. Lawrence*, besides what has already been cited as said by the judges, it was held that under the act of 32 Geo. III.,

the presiding judge is not bound to state his opinion to the jury whether the publication is or is not libellous ; and LORD DENMAN, C. J. observed that he had always followed the practice adopted in that case by the presiding judge, of *leaving it to the jury to say, whether under all the circumstances the publication amounts to a libel.* This was not new doctrine. Long previous to this case, LORD C. J. ABBOTT, in *Fairman v. Ives*, 5 Barn. & Ald. 642, submitted to the jury the facts and circumstances attending a publication alleged to be libellous, and left it to them to say whether it was libellous or not, and the jury having found for the defendant, the court refused to grant a new trial. *Fairman v. Ives* was tried in 1822, and the same course has since been pursued in a great variety of cases, cited in Ch. XII. of the first volume of the body of this work. (See *infra* vol. ii. p. 356, note [1], and p. 358, note [1]. See also same vol. p. 252, note [1], and p. 258, note [1].)

Albany, July 12, 1843.

NOTE.—It is only necessary to add, as a key to the notes, that the single letters (*a*), (*b*), &c., designate the notes of the author ; the double letters [*a a*], &c., notes found in the Appendix to the second volume of the London edition, and transferred to the body of the work for the greater convenience of the reader ; and the figures [1], [2], &c., designate the notes of the editor.

PRELIMINARY DISCOURSE.

OUGHT the faculty of communication by speech or writing (*a*) to be restrained by the municipal law ?

If so, then within what limits ?

The former question may readily be answered in the affirmative ; to answer the latter is to solve a problem of difficulty, but of most essential importance to the interests of society ; it is to discover and establish such legal limits to intellectual intercourse, as shall secure to the community the greatest quantity of good.

Where it is possible, consistently with natural justice, that is, with the principles of general expediency, wholly to permit, or wholly to prohibit, the work of legislation is easy ; it is arduous and difficult in those cases only where either unlimited license on the one hand, or total restraint on the other would be inexpedient, and, consequently, where it becomes necessary *to establish intermediate legal boundaries, by means of apt and definite limits. [*ii]

Legislation, on the present subject, is peculiarly liable to difficulties of this nature ; it is usually impracticable, or at least impolitic, either wholly to sanction or wholly to forbid any particular class of communications on any matters whatsoever, and, consequently, the question arises, how shall the restraining law be framed, so as, without wholly excluding either of two or more conflicting mischiefs, to reduce the aggregate of evil to its minimum. To place a bridle on men's tongues, so that they be restrained from calumny, without lay-

(*a*) In order to avoid repetition in the following pages, unless the context render a narrower meaning necessary, the term *writing* is to be understood to include all kinds of communications, by printing and painting, or any other signs or symbols, as well as writing.

ing irksome fetters on the ordinary communications of society, and to curb the licentiousness, without, at the same time, cramping the salutary freedom of the press, is one of the most arduous, but, at the same time, valuable achievements of legislative wisdom.

Little need be observed as to the importance of laws by which every man's conduct is to be regulated, not only whenever he writes, but even whenever he speaks, or as to the necessity for legislative caution, where the mischief and inconvenience which would result from even a slight defect, are liable to indefinite multiplication by the constant application of the law. It were lost time to dwell on minute errors, when considerations of a far higher and more urgent character demand attention.

The faculty of speech, one of the first and noblest gifts of the Creator, designed, no doubt, for the expression of gratitude to the Donor, of truth and good-will towards men may be abused, for the purposes of blasphemy, fraud, and malice.

[*iii] *Those admirable means which have been devised by human ingenuity (*b*) for giving permanency and ubiquity to thought, for providing durable receptacles to knowledge, in which, like a valuable treasure, it may be preserved, accumulated, and transmitted to distant regions and to all ages ; by the aid of which, the wise and the learned, though locally distant, may unite in the service of science, and availing themselves of the labours of past generations, accomplish magnificent triumphs in the cause of reason and of truth, to which individual talent and exertion might have ever proved unequal, those honoured and splendid means to which mankind must trust, for the safe preservation of all that is sacred and valuable in their religion, their history, their laws, for the security of their liberty and their possessions, to which they are indebted for every intellectual and refined enjoyment, in short, for all the blessings of civi-

(*b*) Some learned men have laboured to prove that letters are not of human invention, but divine revelation. Surely, it is more consistent with the bounty of Providence, to suppose that faculties were originally given adequate to the discovery, than that a special interposition should be necessary for the purpose. Universal experience manifests the intention that all discoveries and improvements in science and in art should be worked out slowly and gradually, by means of the ordinary faculties originally bestowed upon our race.

It is not difficult, in the absence of any satisfactory tradition on this subject, to form probable conjectures as to the process of improvement, which has led from the depicting of rude resemblances, to such remote and admirable results.

lized life ; those, no doubt, may be fatally abused in furtherance of insidious practices against the peace and welfare, or even the very existence of civil society. They may be perverted into the means of destroying men's religious faith, of *extin- [*iv] guishing their sense of moral obligation, of ministering to every evil passion, of fostering every base and vicious propensity, and of actually accomplishing every crime.

Such being the unworthy purposes to which the arts of writing and of printing have been so frequently misapplied, it is manifestly of the most essential importance that such practices should be restrained by force of the municipal law. The reasons for restraint are rendered still more cogent, whenever two circumstances concur : the general diffusion of knowledge, by an extended system of education, and great facility of communication, by the agency of the public press. The former of these causes tends greatly to increase the number, as well of those who are capable of offending in this respect, as of those who are placed within the sphere of their influence and danger of contamination ; whilst the latter multiplies, to a tremendous extent, the facility of working evil by unprincipled and immoral publications.

So long as man's power of effecting mischief is limited to his own immediate and personal efforts, however violent and noxious they may be, against the persons or property of others, the evil which he works must be of a local and limited nature ; but when it is extended by exerting a pernicious and wicked influence over the understandings of mankind, through the medium of the press, its power is bounded neither by time nor place ; any one vicious and unprincipled mind may, as it were, be brought into contact with, and is enabled to exercise its influence over those of millions : thus even a single individual, *as if invested with a kind of mischievous ubi- [*v] quity, is enabled to disseminate blasphemy, sedition, and immorality to the remotest borders of the realm, and the very mass of society may thus be exposed to the danger of contamination and corruption.

The main object of the following Treatise is to trace the municipal provisions of the law of England on this important subject ; but it may not be without use, certainly not without interest, to devote some brief previous attention to the general principles on which such

restraints may be constructed, and to inquire whether there be any, as it were, natural boundaries to be discerned by which such communications ought, with a view to the convenience and happiness of society, to be limited. One rule may prevail at Athens and another at Rome ; partial variations are attributable to the genius and temper of the people (*c*), to the political constitution under which they live, to their peculiar manners and habits, yet must the great distinctions pointed out by reason and natural justice be common to all countries and all ages (*d*).

Such then is the object of preliminary inquiry ; an occupation, it must be confessed, more grateful to a lawyer than the [*vi] tedious detail of a mass of *complicated and oftentimes conflicting decisions, in much the same proportion as a casual visit to foreign countries, to contemplate at leisure their principles and forms of justice, would be more agreeable than the ordinary routine of an English circuit.

The first question, that is, whether such communications ought to be regulated and restrained by any municipal laws, may then, it seems, without the least hesitation, be answered in the affirmative.

The experience of all nations from times of the remotest antiquity, shews the necessity for such laws ; their rudiments are to be found in all stages of civilization, however imperfect, remote and proximate to barbarism. (*e*) Though little is known of

(*c*) Solon being asked if the laws he had given to the Athenians, were the best, replied " I have given them the best they were able to bear." Montesq. 1. 19. c. 21. Divorce was permitted by the Mosaic law among the Jews by reason of the hardness of their hearts.

(*d*) Est quidem vera lex recta ratio, naturæ congruens, diffusa in omnes constans sempiterna,—Nec erit, alia lex Romæ, alia Athenis, alia nunc, alia posthac, sed omnes gentes & omni tempore, una lex & sempiterna, & immutabilis continebit ; unusque erit communis quasi magister & inspector omnium deus.—Cic. De Rep. ib. 3. Apud. Lact. lib. 6. c. 8.

(*e*) So far as it is allowable to speculate on the growth of legislation according to the increasing exigencies of mankind, it is probable that even among the most savage tribes, to impute the want of skill or bravery would be a reproach exciting resentment and violence ; the increase of such attacks and reprisals, attended as it would be by the double inconvenience of dissension amongst those who were united for some common object, and weakening that force which was destined for other purposes, whether of aggression or defence, would first suggest the policy of restraining such insults, and substituting legal redress for personal retaliation of affronts.

Such laws, however, would be but of slow growth and little regarded among

the laws of "ancient Egypt,—the venerable territory at [*vii] once of science and of superstition, yet is it matter of moral certainty that they were not destitute of such restraints.

any people whose principal business was that of arms, and whose policy it was to cherish a high and daring spirit, whilst a warrior, whose courage or honour was reflected on, would but reluctantly delegate the duty of retribution to any hands but his own, conscious that his best proof that the imputation was undeserved, would be afforded by his mode of avenging such an affront.

In a more peaceful and settled state of society, when men had begun to pay deference to civil authority, although the protection of their persons and property from violence might be the earliest objects of legislative provision, yet would it very soon become necessary to make provisions against judicial perjury; and as such an offence, odious as it must always be, would, whilst the administration of justice was rude and imperfect, be highly dangerous, so is it probable that the penalties would be proportionally severe. By the ancient Roman law of the Twelve Tables on this subject, it appears that a corrupt and malicious witness expiated his offence, by being thrown headlong from the Tarpeian rock, in other respects, it is presumable, that the laws against defamation would, in all early stages of civilization, be few and simple. Their main object would be the preservation of the public peace, by the infliction of penalties in respect of oral defamation; libels would be out of the question when few could read, and fewer still could write. Hence it is that many of the earliest laws which history has transmitted to us, are of a penal rather than remedial nature; that they prescribe specific penalties or fines, rather than damages proportioned to the real circumstances, and, as is usual with early legislators, that their enactments are not general, but frequently limited and confined to particular imputations, which were considered as likely to produce violence and outrage.

By the Athenian laws, specified penalties, which varied from a fine of two drachmas to 500, were imposed, in respect of different degrees of defamation, some of which were specifically and expressly prohibited. Thus the fine or *δίκη καυηγορίας*, for asserting that a soldier had thrown away his shield, amounted to 500 drachmas. See below. By the law of the Twelve Tables, a specific fine was imposed on many offences, probably including that of defamation, when it fell within the description of the *injurie leves*, though the punishment of fustigation at least was imposed on more atrocious calumniators. (See the observations on this subject, p. xxxv.) And it is observable, that though, in later times, the Romans substituted an assessment of damages, *estimatio injuriæ*, apportioned to the extent of the injury, for an arbitrary fine, yet that no distinction was ever made by the Roman law, in the description and essence of the offence, between criminal and civil liability; whenever the offender was liable in damages, to the individual calumniated, he was also subject to penal censures. To the latest period of the empire, civil, as well as criminal liability, depended principally, if not entirely, on the ancient and primitive notion, that *personal contumely and insult* was of the essence of the offence, and upon this principle it is that the peculiarities of the Roman law, in respect of libel chiefly depend.

This, it will be seen, is a circumstance which constitutes a very essential and characteristic distinction between the law of England and that of Rome, and of

- [*viii] *The well known fact that this singular people erected a tribunal (*f*) for trying the conduct even of their kings after death and of decreeing or denying the honours of sepulture, according to the verdict, *is in itself sufficient to demonstrate not only that they fully understood and appreciated the value of reputation and character, but also that they duly estimated and encouraged the love of reputation as a great moving principle of human conduct ; and that they possessed sagacity sufficient to turn that knowledge practically to the public account, by using this moral power in the most forcible and advantageous manner. There is perhaps no other memorial extant of this extraordinary nation which so strongly characterizes their political genius as does this remarkable institution (*g*), which, however, has served no other purpose among those who have copied largely from Egypt in other respects, than to supply the foundation of a well known branch of pagan mythology, as immortal as the epic poem in which it is so beautifully depicted. The effect of this custom among the Egyptians must have been greatly heightened by its connection with their superstition, in respect of the rights of sepulture, and the religious neces-

those countries which have adopted the civil law : for the law of England regards criminal and civil liability, in respect of calumnious communications, as standing upon entirely distinct foundations ; and in the next place, has, from very distant times, considered the temporal injury to a man's estate, and not the contumely or insult of the agent, as the ground of compelling reparation in damages.

According to an ancient law of the Burgundians, "*Si quis alterum conegatum clamaverit 120 denariis mulctetur. Si quis vulpeculam alterum clamaverit vel leporem eodem modo mulctetur.*" These, as is observed by a learned writer, [Barrington on the Penal Statutes,] appear plainly to be the laws of a warlike nation, in which the calling another by a name which implied cunning or flight, rather than courage or resistance, was thought a heinous infamy.

To a much later and more mature stage of civilization must those laws be referred which consider defamation not merely as an insult to the feelings or dignity, which must be repressed for the sake of the public peace, but which regard reputation as a civil right, from its being intimately and inseparably connected with the acquisition and secure enjoyment of every social right, dignity, or emolument, and so essential a safeguard to every other temporal possession and enjoyment that to leave it unprotected would be to leave every man's property, liberty, and even life insecure, and the work of legislation but half completed.

(*f*) Diod. Sic. B. 1.

(*g*) I find that M. Rollin (*Histoire des Egyptiens*, 73,) has characterized this custom as one of the most remarkable facts in ancient history, and he points out a very singular analogy in sacred history. The Israelites would not suffer those of their kings, who had lived wickedly, to be buried in the tombs of their ancestors.

sity of preserving the bodies of their dead in order to their subsequent reanimation.

It is impossible to suppose that, whilst even after death, conduct and reputation were the subject of anxious inquiry, direct and immediate provision was not also made by the laws of Egypt for securing and preserving the characters of the living.

It is not, however, essential to the present purpose to examine in detail (*h*), the provisions connected with the subject in the laws of Judæ (*i*), Greece, or Rome, nations which probably derived their

(*h*) For a very able and detailed historical account of the law of libel, see Mr. Holt's excellent work on the subject. Second edition, Book 1. ch. 1.

(*i*) The early denunciations of the Mosaic law against defamation are few and simple; no specific punishment, except in an instance which will presently be alluded to, was appointed against calumniators. There is, however, scarcely any offence which is more frequently alluded to in the psalms of David, or more strongly described in the energetic and figurative language of the east, than that of slander; whether it be for the purpose of characterizing the conduct of depraved and malicious men, of denouncing divine vengeance against them, or depicting the wretched and forlorn state of their unhappy victims; it may be further remarked that mention is seldom made of this species of injury, without some expression which shows that slander was meant, in its strict sense, as implying a false and deceitful representation.

Psalm 5. Thou shalt destroy them that seek leasing; the Lord will abhor both the bloodthirsty and deceitful man.

10. His mouth is full of cursing, deceit, and fraud; under his tongue, ungodliness and vanity.

14. There is none that doeth good, their throat is an open sepulchre, the poison of asps is under their lips, their mouth is full of cursing and bitterness, their feet are swift to shed blood.

31. Let the lying lips be put to silence which cruelly, disdainfully, and despitefully speak against the righteous.

34. What man is he that lusteth to live and would fain see good days; keep thy tongue from evil and thy lips that they speak no guile.

35. False witnesses did rise up against me; they laid to my charge things that I know not; the very abjects came against me unawares, making mouths at me and ceased not. They imagine deceitful words against those that are quiet in the land; they gaped on me with their mouths, and said, lie on thee! lie on thee! we saw it with our eyes.

38. My lovers and my neighbours did stand looking upon my trouble and my kinsman stood afar off: they also that sought after my life, laid snares for me, and they that went about to do me evil, talked of wickedness and imagined mischief all the day long.

52. Thy tongue imagineth wickedness and with lies thou cuttest like a sharp razor. Thou hast loved to speak all words which may do hurt; O thou false tongue, therefore shall God destroy thee for ever.

[*xii] earliest knowledge of jurisprudence from Egypt ; some of their *laws will afterwards require more particular attention ; for the present, suffice it to observe that they all contain enactments imposing prohibitions and restraint, in order to guard against the abuse of language, by converting the privilege of communication into the means of effecting private injury or public (*k*) mischief.

The evils which necessarily arise from a licentious abuse of the faculties of speaking and writing, would be of too obvious a nature to bear inquiry or comment, were the mere necessity for restraint the sole object of investigation ; but a far more difficult consider-

58. The ungodly are froward even from their mother's womb ; as soon as they are born they go astray and speak lies, they are venomous as the poison of a serpent.

59. Deliver me from mine enemies, O God ! behold they speak with their mouths and swords are in their lips.

69. They that sit in the gate speak against me, and the drunkards make songs upon me. See also Psalms 101, 102, 120, 140, &c. &c.

The publication of false reports, affecting the character of others, is prohibited by the Mosaic law, (Exod. xxiii. 1.) although no punishment is annexed to a violation of the law ; whether that was left to the discretion of the judge, or no punishment whatever was inflicted, seems to be doubtful. See Michaelis's Comm. on the Law of Moses, art. 221, s. 2. The same learned writer observes, "this last supposition (i. e. of impunity,) prevailed with respect to the greater number of extra-judicial offences during the infancy of nations, which approaches nearly to a state of barbarism and lawlessness, wherein mere verbal attacks on reputation are not so highly estimated, nor yet even violent outrages so strictly interdicted as afterwards. But, on the contrary, a person thus injured is permitted to avenge himself on his traducer, provided he did not beat him to death, or render him a cripple. If a wicked action, which a man related concerning his neighbour was true, he received no punishment whatever ; for the *exceptio veritatis* then operated in full force." Michaelis's Comm. on the Laws of Moses, art. 291. s. 2. Smith's translation.

There was one instance, and but one, where the law of Moses imposed a specific punishment upon the publication of calumnious falsehood, and that was where a man falsely accused his wife of not having proved a virgin on the wedding night. Deut. xxii. 13, 19. The penalty, in respect of such a charge, which, where well founded, was expiated by the death of the criminal, was threefold :—1st. corporal by stripes ; 2ndly, by the payment of a pecuniary fine, viz. 100 shekels to the woman's father, which was the highest fine imposed by the Mosaic law, and was no doubt given to the father in respect of the reproach which had been cast, not merely on the woman herself, but her parents, brothers, and sisters, and the whole family ; 3rdly, by his forfeiture of the right of divorce.

(*k*) The necessity for such regulations naturally occurs to the illiterate as well as the educated. The members of Benefit or Friendly Societies, in this country, who usually legislate for themselves, seldom complete their simple, artless code without introducing penal prohibitions, and oftentimes singular ones, against unmannerly and abusive language.

ation remains behind, and, in order to judge of the mode and extent of the limits which ought to be imposed on such communications, it is essential, in the first place, to inquire, as to the nature and extent of the evils which render such restraints necessary, or at least expedient.

This consideration immediately leads to a very important and characteristic distinction between such evils as are occasioned by an abuse of these faculties, *first, to *individuals* [*xiii] *as in particular (l)*, and secondly, to *society in general*.

In law, as well as medicine, it is natural to suppose, *a priori*, that different evils would require different remedies.

The most serious and dangerous form in which an injury of this nature can affect *an individual*, is, that of a false accusation of a crime; especially where it is aided by false testimony, in a court of justice, by which the property, liberty, or even life of the accused is placed in direct and immediate jeopardy. The making a false charge, even where it does not end in a legal assassination, by the death of an innocent party, is so enormous a crime in its consequences, and so odious and atrocious an abuse of the forms of justice, as to render it probable that this species of defamation would attract notice and punishment in very early times; and it is remarkable that the first denunciation against slander, in the Mosaic law, seems to be coupled *with a specific denunciation (*m*) against judicial calumny, afterwards more emphatically [*xiv] repeated in the Decalogue.

(*l*) When the injury is principally to the individual, it is obvious that, on grounds of natural justice, compensation ought to be made to him; and where the awarding damages to the individual injured is a sufficient restraint, it would be inconsistent with the first principles of civil liberty to inflict a further penalty by fine to the state, or the imprisonment of the offender, simply for the reason, that such further restraint is unnecessary; and therefore penal, as contra-distinguished from civil liability, ought not to attach, unless either where restraint is necessary, and no individual in particular is injured, as in the case of a blasphemous or immoral publication, or where, though an individual be injured, yet the public are also injured or placed in jeopardy, either by the means of annoyance used,—or because the private remedy is in itself an insufficient restraint, in consequence of the difficulty of enforcing it.

(*m*) Thou shalt not raise a false report; put not thine hand with the wicked to be an unrighteous witness. Exod. c. xxiii. v. 1. See also Deut. xxvii. 25.—And though, by the law of England, judicial perjury is accounted but a misdemeanor, unless, indeed, it be used as the successful means of taking away the life of an innocent per-

Such practices, which tend immediately to the privation of property, liberty, or even life itself, are formidable in proportion to the probability that they will be successful; and, therefore, although they must at all times, and under all circumstances, be highly dangerous, yet is it obvious that they are the more particularly to be dreaded, whenever the means of judicial investigation are still imperfect and inadequate to the attainment of truth (*n*), or in a subsequent stage of society, when, for purposes foreign to justice, false accusers are listened to and encouraged (*o*)

[*xv] *A man may also be placed in a state of legal jeopardy by means of slander which affects him indirectly in a judicial proceeding. This may occur in all cases where the law admits evidence of a man's general good character (*p*), for the purpose of rebutting the presumption of guilt on a criminal charge; for, by the propagation of calumnious reports, he may be unjustly deprived of the advantage which the evidence of good character

son, yet, by the laws of many nations, it has been punished capitally. By the law of the Twelve Tables, a false witness was thrown from the Tarpeian rock, *si falsum testimonium dicassit saxo dejector*, Gell. xx. Afterwards the punishment was arbitrary; 1. 16. D. de testibus.—SENT. v. 25. s. 2. Except in war, where a false witness was beaten to death with sticks by his fellow-soldiers. Polyb. vi. 35. The Libellus Famosus, or false and anonymous charge of a capital crime, was, by many later laws, punished capitally.

(*n*) It is the ordinary policy of a barbarous and illiterate people, to substitute artificial and arbitrary proofs of innocence or guilt in the place of careful and rational investigation. Hence the superstitious modes of trial by the Saxon ordeal and Norman combat, and the doctrine of compurgation, or law wager, which, even at this day, is permitted by the law of England.

(*o*) Witness the legal assassinations which were effected among the Romans, when "*ut quis districtior accusator velut sacrosanctus erat.*" And also by means of the Libellus Famosus, or secret charge of a capital crime. So fatal had such accusations become, that the authors of them were justly made amenable to capital punishments by numerous provisions.

(*p*) As the law of England does. Formerly, common fame that a man had been guilty of an offence, was sufficient ground, by the law of England, for putting him on his trial, without any other preliminary inquiry. Among the Romans, witnesses to character were called *laudatores*, and if the accused could not produce at least ten of these, it was deemed better to produce none.—*Quam illium quasi legitimum numerum consuetudinis non explere.*—Cic. Verr. v. 22, and see Cic. pro Balb. 18. Cleunt. 69. In the rude and barbarous times of our Saxon ancestors, where compurgation was a species of trial, and when an accused party was deemed to be innocent without further inquiry, because a specified number of witnesses swore that they believed him to be so, character and reputation, if respect was really paid to such oaths must have been of infinite importance.

would otherwise have afforded. The destruction of character, in such a case, would not only affect a party directly, by depriving him of that evidence which he might have used positively to his advantage, but negatively and indirectly also, by raising the inference, that he is a man of absolutely bad character.

To this extent may an individual be injured by false charges, through the medium of judicial proceedings. In the next place, although the value of character, and *its intimate [xvi] connection with every benefit and advantage which social life can confer be obvious, yet, in order to appreciate fully the extent of the evil which may result from privation of character and the nature of the remedy which ought to be awarded in respect of such an injury, a few observations may not be wholly superfluous.

A state of civil society is in effect one great system of mutual aid, trust, and confidence (*q*), by which mankind are bound together. Each individual, whatever be his rank, his talents, or his wealth, considered as a single and isolated being, is weak and helpless, each must depend on others, not only for the comforts, but even for the necessities of life, for security of person and of property. He must trust to his lawyer for the preservation of his property when it is claimed by an *adversary; to his phy- [*xvii] sician in time of sickness; to his servants for the faithful discharge of the ordinary though meaner duties of life. But the reposing of confidence implies the selection of agents competent

(*q*) The first principle of civil association, the *mutuum beneficiorum commercium*, is described by Seneca, with such beauty and simplicity that little excuse is requisite for transcribing the passage :—

Quo alio tuti sumus quam quod mutuis juvamus officiis ? hoc uno instructior vita contraque incursiones subitas munitior est beneficiorum commercio. Fac nos singulos quid sumus ? præda animalium et victimæ ac bellissimus et facillimus sanguis. Quoniam cæteris animalibus in tutelam sui satis virium est : quæcunque vaga nascuntur & actura vitam segregem armata sunt. Hominem imbecillitas cingit, non unguis vis non dentium terribilem cæteris fecit, nudum et infirmum societas munit. Duas res dedit quæ illum obnoxium cæteris validissimum facerent rationem est societatem. Itaque qui par esse nulli poterat si seduceretur rerum potitur. Societas illi dominium omnium animalium dedit : societas terris genitum in alienæ naturæ transmisit imperium & dominari etiam in mare jussit. Hæc morborum impetus arcuit, senectuti adminicula prospexit, solatia contra dolores dedit. Hæc fortes nos facit quod licet contra fortunam advocare.—Hanc societatem tolle et unitatem generis humani quâ vita sustinetur scindes. Senec. de benef. l. 4. c. 18.

to the discharge, as well of the higher and more important duties of a public nature, as of the ordinary and private duties of society. With the exception of those high public offices, which, on grounds of civil policy, are, by the constitution of the particular state, decreed to be hereditary, the appointment must be matter of selection and choice vested in the government, or in the people, or in individuals specially delegated to the trust, and every member of society must be left to exercise his own discretion in selecting those whom he may choose to trust in the varied connections of life. Now it is obvious, that it seldom can happen that the power of selection can be properly and discreetly exercised on the mere personal knowledge of any single individual, founded on his own actual experience. It is constantly necessary to place reliance on the knowledge and information of others, not only in those instances where choice is to be made of public functionaries, but even in those ordinary and daily instances, where every man reposes trust and confidence in others, with a view to his own interests and private concerns. Whether a house is to be built, or a surgical operation performed, a suit to be commenced, or a farm to be purchased, it rarely happens that the party interested in selecting his architect, his surgeon, his solicitor, or surveyor, does not place some reliance on information, which he derives from others, as to the skill or integrity of the agent whom he elects to employ.

[*xviii] *Again, every one who trusts another, usually possesses both the inclination and the means of forming some estimate of his abilities and principles; and though the opportunities of each observer may be limited, yet if all who know the party so trusted concur in forming the same general conclusion on the subject; if they all agree in stating that he is skilful, diligent, faithful, and honorable in his dealings; that general coincidence in opinion of many possessed of the means of judging, affords a reasonable degree of probability in favour of the correctness of their conclusion. Hence it is, that where a trust is to be reposed, and a selection made, the party who is to exercise it may fairly rely, not only on the particular and actual experience of other individuals, but also on *general character* derived from the united experience of others.

Such, then, being the close and intimate connection between

character and temporal preferment or acquirements, two circumstances are to be noticed, for the purpose of showing how peculiarly susceptible character and reputation are of injury, and how easily confidence in an individual is destroyed or intercepted by slight causes ; and, consequently, of inferring the general necessity, not only of protecting reputation by municipal provisions, but also of devising such as are adequate to the exigency of the occasion.

In the first place, it is to be remarked, that good character is but *presumptive* evidence of good principles ; whilst, on the other hand, the commission of a single dishonourable or unworthy action is *demonstrative* of bad ones. Hence it is that the report of a *single act* of *delinquency, if credit be given to it, at [*xix] once is fatal to the most exalted reputation.

The character acquired by an exterior of probity exhibited to the world for half a century, necessarily yields at once to the proof that the party is at last guilty of a single act of dishonesty.

In the next place, as far as reputation and confidence in character are concerned, *slight suspicion* is usually attended with the same evil consequences, with belief, founded on actual proof and suspicion is thus equivalent to proof. For where even a slight suspicion, as to a man's conduct or principles, is once excited, he who would otherwise have reposed confidence, must either proceed to do so, notwithstanding the suspicion which prevails, or remove all doubt by inquiry and investigation, or withhold his confidence altogether. To trust blindly, and without inquiry, as to character, would usually be deemed rash and imprudent ; but to do so, after an actual though obscure warning, would be an act of folly and imprudent weakness, where a man's own interests were concerned, and of real injustice, where the interests of others were involved. To inquire and investigate would usually be a work of labour, trouble, and difficulty, in which few care to engage ; and thus it would seldom happen that the party whose duty or interest it was to make the selection, would not adopt the third alternative, and withhold his confidence from one to whom a suspicion, however slight, attached, to repose it in another whose character was untainted. If one, about to deposit a large sum of money in the hands of a banker, were casually to hear that he had committed an act of bankruptcy, what course

*would be the natural consequence ? To trust without [*xx]

inquiry, would be absolute folly; to investigate the truth of the report would, at all events, be irksome and troublesome, and, after all, might be unsatisfactory; the natural result would be, that he would choose to employ some other depositary, who was placed beyond the reach of all doubt and suspicion. But as one acted, so would all, and thus a false alarm, originating in private malice, might be adequate to the destruction of credit and consequent ruin.

Again, although the municipal law of the land may afford security of person and of property to all, yet is there a large and estimable portion of good, which arises from a state of civil society, a participation in which cannot be positively conferred or secured by any laws, and the enjoyment of which cannot be protected, except negatively and collaterally, by the restraining such injuries to character as tend to destroy it. That constant reciprocation of good offices, of mutual aid and friendship, which constitutes the great charm and blessing of social life, and which depends on the exercise and influence of the ordinary feelings of kindness and benevolence, can be but remotely influenced by any municipal regulations. But as no man of honour or reputation would willingly connect himself with base and unworthy associates, imputations on a man's conduct or principles necessarily tend immediately to debase and degrade him from the situation he holds in the favour and esteem of others.

To exalt a man's reputation in society is to ensure to him the respect and affection of mankind, and to lay open the [*xxi] avenues to prosperity and honour; to degrade *and disgrace him is to banish him to a state of wretched solitude and destitution (*r*), to render him the very scorn of men, the out-cast of the people,—a condition lower than that of the brute which enjoys its mere animal life, unembittered with the painful sense of degradation, dishonour and contempt.

Now, although municipal laws cannot properly interfere to direct, or control men in their ordinary intercourse and mutual transactions, but leaves each at liberty to exercise his own discretion, and, consequently, although such laws cannot, by any positive and direct interposition, secure to an individual the advantages, benefits, and comforts, to which his conduct in society may justly entitle him, yet

(*r*) *Nulla interimente sed cunctis aversantibus et commercia etiam sermonis negantibus.*

the law not only may, but ought to interfere, to protect him from unjust and malevolent aspersions which deprive him of the benefits and advantages in which, as a member of the community, he ought to participate.

The law cannot compel individuals to consult the most skilful physician ; it must be left to a patron to select, in his discretion, the most worthy object for bestowing preferment ; but, though the law cannot, in any such instances, ensure success to the most deserving, but must leave it to depend on the discretion and consciences of individuals, yet it may, on the soundest and most obvious principles of justice, interfere to prohibit false and injurious charges of ignorance, dishonesty, or profligacy, which tend to exclude such parties *from enjoying that degree of success to which [*xxii] their merits justly entitle them.

The right, then, of every man to the character and reputation which his conduct deserves, stands on the same footing with his right to the enjoyment of his life, liberty, health, property, and all the comforts and advantages which appertain to a state of civil society, inasmuch as security to character and reputation are indispensably essential to the enjoyment of every other right and privilege incident to such a state.

Assuming, then, that restraint is expedient, with a view to the protection of the private interests of individuals, what is the proper mode and measure and extent of such restraint ?

Prohibitory restraints must be either *preventive*, *remedial*, or *penal*.

The very nature of the injury excludes, to a great extent, all merely *preventive* provisions. By the law of nature and reason, a man is justified in repelling attempts at personal violence, by opposing force to force. Injuries to character do not admit of such restraints, they are usually inflicted in the absence of the party whose character is defamed. It is true, that the press might be subjected to censorial restraints, which could not be applied to oral or written calumnies ; the policy, however, of this species of restraint, as well as the principles of *penal* coercion, will be more conveniently considered hereafter.

The most obvious and practicable mode, indeed the only one which merits consideration, consists in the awarding a *pecuniary recompense* in *damages*. It may, however, be proper to remark,

[*xxiii] that, although the *very nature of the injury excludes a remedy by restitution, yet, that attempts have been made among some modern nations, to award a proximate kind of remedy, by compelling the calumniator to pronounce a *palinode*, or recantation, of his slander. It may suffice to remark, that this is at best a remedy of a very doubtful and unsatisfactory description.

The sincerity of an extorted recantation must necessarily be stamped with suspicion. It is obvious, that the degree of credit which it deserved would bear an inverse proportion to the fine to be paid or punishment to be suffered, in the alternative of the party's refusing to pronounce the required *palinode*. If A. being adjudged either to acknowledge that B. was not a rogue, or to pay £100, were to elect the *palinode*, the only safe inference would be that A., for some reason or other, had rather admit that B. was not a rogue than pay the money.

What then are the proper limits to the remedial action for damages? in other words, what circumstances at the least ought to concur to entitle the party to the remedy, and under what other circumstances ought the remedy to cease notwithstanding that concurrence?

The circumstances on which the title to a remedy must depend, are obviously, 1, the injurious *quality* or *consequences* of the calumny; 2, the mode or extent of *publication*; 3, the *motive and intention* of the party in publishing; or 4thly, *collateral circumstances* connected with the publication.

In the first place, then, as far as regards the *nature, consequences* and *quality* of the defamatory matter published, the [*xxiv] *very notion of compensation implies, that some loss or damage has been occasioned.

It were almost nugatory to remark, that to fix any precise and settled sum or value, as the amount of the fine or damages to be paid by an offender of this description, is the work of early and inexperienced legislators (s), and that the recompense ought always

(s) The laws of Solon punished calumniators by an arbitrary fine. Pettit in Leg. Attic. By the law of the Twelve Tables, the injuria in general subjected the offender to pay a pecuniary fine or compensation. "Si quis alteri injuriam faxit, XXV. Æris pœna sunt." The folly and absurdity of making either a fine or compensation fixed and arbitrary, was well illustrated in the instance of Veratius, or

to be apportioned to the actual extent of an injury which is so uncertain and various in its consequences.

The remedy then is applicable, and ought, in point of natural justice, to be applied, unless there be some extrinsic reason to the contrary, in all cases where a party has suffered any actual loss or detriment in his person or property, from a wilful act of slander. And this principle extends not merely to all cases where the *party has been deprived of some actual legal right, [*xxv] but to all others where any social benefit has been intercepted which he would otherwise have enjoyed, although he could not have claimed it as an absolute and vested legal right. Thus it extends not only to the case where a man, by malicious slander, suffers a temporary privation of his personal liberty, to which he has an absolute legal right, but also that of a clergyman whose presentation to a benefice has been hindered by such means.

For although the law cannot interfere for the purpose of enforcing the moral obligation on the part of the patron, to prefer the most deserving candidate, but necessarily leaves the choice to his conscience and discretion, yet it may properly interfere for the protection of character, and to compel a compensation in respect of a loss or damage, immediately consequential on a wilful privation of character.

The party defamed had no legal title or perfect moral right to be preferred, but he had, in point of natural justice, a *right to the character* which his conduct deserved, and consequently a right to compensation for the mischief occasioned by one who had wrongfully defamed him. This general principle obviously embraces every instance where the slander occasions any loss whatsoever, capable of pecuniary admeasurement.

Neratius, a rich Roman, who took great delight in walking through the streets of Rome, striking all those whom he met, according to his fancy and caprice; he was followed by a servant loaded with money for the purpose of immediately paying the appointed fine to those whom he had thus insulted. Gell. Noct. Att. XX. 1. It may fairly be presumed, that he was a strong man as well as a rich one, or that the fine and blows would speedily be returned, the latter with interest, and that he would literally be repaid in his own coin. The absurdity of annexing an invariable compensation to a variable injury, naturally occasioned a more equitable law. *Prætores postea hanc penam abolescere et relinqui censuerunt injuriis qui æstumandis recuperatores se daturos edixerunt.* Gell. Noc. Att. XX. 1. Heinecc. Ant. Rom. Ad. Inst. Lib. 4. tit. s. 5.

But, in the next place, ought the remedy to be confined to those instances, where it can be shown that some *actual specific loss* or damage has been sustained in consequence of the calumny ; or, if not, within what limits ought the remedy to be extended ?

[*xxvi] *It would in the first place, be highly inconvenient and inexpedient to make actual damage essential to the action, without regard to the obvious and immediate tendency of the defamation to occasion great, it may be irreparable injury. In ordinary instances it may be sufficient that the law should provide a remedy for a mischief already suffered, without presuming or anticipating any future evil consequence. Be this as it may, the peculiar nature and tendency of an injury to reputation renders it convenient, if not essential, that, in some instances at least, a remedy should be given in respect of calumnious imputations upon character though no actual consequential damage can be proved. That is, it is desirable, if not necessary, under certain limits, to constitute the defamation a substantive and positive injury, independently of the proof of consequential damage.

Were it otherwise, if actual loss were invariably essential to the remedy, the damage occasioned would frequently be irreparable. One of the peculiar and striking characteristics of this species of injury is the difficulty, or rather the impossibility, of estimating its noxious consequences, and adducing proof of actual mischief during its ruinous and destructive progress.

If a physician, attorney, or merchant, could not obtain a remedy in respect of calumnious reflections upon his character or credit, until he could adduce specific instances of losses occasioned by such attacks, he might be effectually ruined before his proof was complete. Slander tending to the disinherison of the party calumniated, affords a strong illustration of this doctrine. If it were to be maliciously

suggested to the proprietor of a large family estate, [*xxvii] that his heir apparent was illegitimate, *such a report, if believed, might strongly tend to induce the owner to devise his property to another branch of the family of undoubted legitimacy. Now if the heir apparent were not permitted to complain of the wrong done him, until the injury had been consummated and completed by his disinherison, the remedy would frequently be afforded in vain ; it would be most difficult to prove that he had

been disinherited in consequence of the slander, and even if he could prove the fact, the author of the mischief might be unable to yield compensation, and thus a serious and cruel injury would be left without a remedy. On the other hand, by regarding the slander as a substantive injury, the party aggrieved is entitled to arrest the progress of the mischief in limine; by means of an action against the author or publisher of the scandal, the challenges him to produce formal proof of his charges; he establishes their falsity, if they be false, and obtains reasonable damages for the trouble, anxiety, expense, and danger to which he has wantonly been exposed, and the mischievous effects which might otherwise have accrued from the slander are averted.

Is then the remedy to be extended indefinitely, though no special damage can be proved, to every species and degree of defamation which tends to the occasioning of some loss or damage; and if not, where is the limit to be assigned?

To extend the remedy indefinitely to all communications tending to produce damage, and *a fortiori* to award a pecuniary recompense in respect of such contumelious and insulting language as was not likely to produce temporal damage, though it tended to hurt the *pride or delicacy of the offended party, would, [*xxviii] it seems, be highly inexpedient.

For, in the first place, as it is difficult to say that any undeserved imputation on a man's moral conduct, character, or temper, does not tend to dislodge him from his state and condition in society, and thus remotely at least to deprive him of temporal comforts and advantages, it is plain that so wide an application of the principle would afford far too large a scope for vexatious litigation, and the ordinary intercourse of society would be impeded and fettered by the apprehension of vexatious and harrassing suits for trifling causes.

Abusive, insulting, and unmannerly language, which affect not a man's liberty or estate, are of too indefinite and uncertain a character to be the subject of an action for pecuniary damages (*t*). Such injuries, or rather affronts to the feelings, are as incapable of definition as of admeasurement. They depend on the rank, situation, and condition of the parties, and on circumstances which may

(*t*) Contumelia minor est injuria quam queri magis quam exsequi possumus; quam leges quoque nullâ dignam vindictâ putaverunt.

be felt but not defined ; they may depend on the tone of voice, the gestures, even looks by which they are accompanied, and in some instances, silence may be more contemptuous and insulting than direct expressions (u).

[*xxix] *It seems then that it is expedient, on principles of general policy and convenience, that the law should define, by sufficient limits, in what instances simple defamation, unaccompanied by special damage, should constitute a substantive ground of action. It is obvious that the application of these principles, in particular instances, must in a great measure depend on the state and circumstances, manners and habits, of the society for whose use such rules are to be applied.

There is, however, one consideration of external policy which always operates in favour of the extension of the action. Experience has fully proved that to refuse, or even to restrict the civil remedy within too narrow limits, is sure to occasion personal conflicts and bloodshed ; the ordinary transition is *a verbis ad verbera*, men being always apt to carve out their own remedy in such cases where it is denied by the law. And though this consideration operates principally as an argument for subjecting calumniators to penal censure, inasmuch as such insults tend immediately to produce public mischief and disorder, yet is this consequence by no means to be overlooked in relation to the civil remedy ; for no provi-

[*xxx] sion can more surely tend to *restrain individuals from avenging injuries to their reputation than to have the means afforded, not merely of obtaining redress and compensation, in the shape of damages, which is frequently but a secondary consideration with an injured party, but also, which is usually of in-

(u) The Roman law which made the *personal insult or contumely* the basis of the action, civil as well as criminal, was exceedingly vague and indefinite ; see the observations below, p. xxxi. By the law of England no action lies in respect of the *speaking* of mere general abusive words which are not followed by special damage, neither are such words indictable, unless in some special cases, as where they amount to a challenge, or affect a court or magistrate in the execution of public justice, or are applied to the magnates of the realm. The only mode of proceeding by the law of England, in respect of abusive, and unmannerly and insulting language in general, is by causing the offender to be bound over to the good behaviour. The ancient restraints on scolds, the ducking stool and the bridle, whether it be that the one sex is grown more gallant or the other less virulent, have long fallen into disuse.

initely greater importance, of vindicating their characters, by openly challenging their accusers to proof of their assertions. This mode of vindication, which for reasons which will afterwards be adverted to, cannot be permitted when the proceeding is purely of a criminal nature, necessarily occurs where the very essence of the injury consists in the *falsity* of the accusation.

It is further to be observed, that in this, as well as other instances, where a general rule in the affirmative or negative cannot be adopted, but where it becomes necessary to define the legal boundaries, it is always more important, as a matter of legal policy, to adopt plain and general distinctions, for the sake of clearness and notoriety, although some other consideration of policy should be partially sacrificed, than to draw a line more nearly adjusted and suited to conflicting principles, but of greater intricacy, obscurity, and difficulty. For it is obvious that the quantity of mischief and inconvenience which may result from adopting an indistinct rule, or ill defined boundary, may far exceed any evil which could result from the partial(v) sacrifice.

(v) The law of England defines, with much greater distinctness than is usually found in other codes, the limits of the civil action for *oral* slander in the absence of special damage. 1st. The remedy is afforded in respect of a charge of an offence visitable with corporeal punishment. 2ndly. An imputation of labouring under some particular infectious disorders. 3rdly. Imputations which affect a party in his office, profession, trade, or means of livelihood; or, 4thly. Aspersions which tend to his dishonour. The law is less definite in two instances. 1st. In respect of slander against the magnates of the realm, or *scandalum magnatum*, where the remedy is given by several ancient statutes, in respect of calumnies against the character of *grandees*; and, 2ndly, in the instance of written slander or libel, for, contrary to the principles of common law, general insulting and contumelious expressions are the subject of an action, when the communication is in writing, though the same words would not have been actionable, had they been merely spoken. This anomalous appendage to the common law principle, which regarded not the contumely and insult so much as the loss to the parties' estate and means, seems to be plainly attributable to the doctrines of the civil law, which were first imported into the Star Chamber practice, in cases of libel, and after the abolition of that court, were, in part at least, recognized by the courts of common law; and by this means the action for written slander is of very indefinite extent. See vol. 1, p. 148.

The ground of the action, under the ancient Roman and civil law, was the *injuria*, the personal insult or contumely offered to the party defamed; and hence it was that the limits of the action, according to the Roman law, were very indefinite and indistinct. *Ait prætor qui adversus bonos mores, convicium cui fecisse, cujusve operâ*

[*xxxì] *Next, as to the *quality* of the matter published.
Assuming, then, that the defamatory matter complained

factum esse dicitur quod adversus bonos mores convicium fiat in eum iudicium dabo.
D. 1. 47, 10.

Again, ait prætor ne quid infamandi causâ fiat, si quis adversus ea fecerit prout quæque res erit animadvertam.

Again, Generaliter, vetuit prætor quid ad infamiam alicujus fieri. Proinde quodcumque quis *fecerit vel dixerit ut alium infamet erit actio injuriarum*.

Some curious instances are given in the digest of the application of these principles of the Roman law. Item si quis pignus proscripserit venditurus tanquam a me acceperit infamandi mei causâ. Si quis non debitorem, quasi debitorem appellaverit injuriæ faciendæ causâ, injuriarum tenetur.

Another illustration presents a very singular mode of defamation, which arose out of the practice which prevailed at Rome, for the relations of an accused party to dress in sordid habits, and allow their beards to grow, in order to excite compassion and favour towards the accused. Hence it was that a party intending to defame another, accomplishes his object by assuming a squalid and abject appearance, under pretence of supplication for one accused of a heinous crime. *Hæc autem ferè sunt quæ ad infamiam alicujusque fiunt. Ut puta ad invidiam alicujus veste lugubri utitur aut spualidâ aut si barbam demittat vel capillos submittat, aut si carmen conscribat, &c.*

Many incidents were founded on the doctrine of the Roman law, that contumely was the ground of action, in which it differs from the law of England. If an infant, or one in a state of intoxication, defamed another, the action failed, for the mens rea, the contumelious intention, was wanting; in England, such a defence, if the act were voluntary, would be unavailable.

By the Roman law, a party was not only entitled to sustain an action for contumelious words spoken concerning himself, but also in respect of those spoken of others of his family, if they tended collaterally to subject him to degradation and contempt.

Thus, a father was entitled to recover, in respect of a contumelious injury offered to his wife, children, or domestics, provided the offender knew the relationship of the party so offended. Heineccius, pt. 7. sec. 118. So far was the principle carried by the Roman law, that even the heir was entitled to an action for an insult to the remains, or even the memory of the deceased. *Et si forte cadaveri defuncti fit injuria cui hæredes bonorum possessores exstitimus, injuriarum nostro nomine habemus actionem. Spectat enim ad existimationem nostram si quæ ei fiat injuria. Idemque et si fama ejus cui hæredes exstitimus lacessatur.*

The same degree of indefiniteness which characterises this branch of the Roman law, naturally pervades, also, the codes of those nations who have adopted the principles of that law. In Scotland, for instance, the limits of civil as well as criminal liability are exceedingly wide. Thus, in the case of *Aitken v. Read and Fleming*, 2 Mur. Rep. 149, (cited in Mr. Borthwick's learned and valuable Treatise on the Law of Libel in Scotland, p. 184,) the judge observed, "There are disadvantages in allowing actions of this sort, where there is no accusation of a crime, or allegation of specific damage. By the law of Scotland, however, *any thing defamatory* is the foundation of an action." In the case of *Mackenzie v. Read*, 2 Murr. Rep. 159-

of *either produces or immediately tends to produce [*xxxii] actual damage, ought the *fa'sity* (*w*) of that which is

Borthw. 184, the court, after observing that the law on the subject of slander, in England, was very particularly defined, added, *here*, any thing that *produces uneasiness of mind*, is actionable.

Several instances are cited by Mr. Borthwick, in his excellent work, p. 186, of suits commenced and sustained on very slight grounds. In *Memis v. Jop and others*, Dr. Memis instituted an action against the defenders, in order to obtain redress for the alleged injury of having caused his designation, “*Medicinæ doctor in Aberdonia*,” contained in the charter of the infirmary, to be translated “*Doctor of Medicine in Aberdeen*,” instead of *physician* in Aberdeen. The action was sustained; but, after *years of litigation*, the defendants were assolizied. In the conclusion of his report, Mr. Tait observes, “That there was no strong animus injuriandi to hurt Dr. Memis seemed admitted; at the same time, it appeared a conduct rather peevish and uncivil in his brethren, and an intentional affront to refuse to gratify the doctor in this request. But the lords thought *that they did not meet to decide what was civil, but what was wrong*. In this case, there was no wrong. The translation was good; no damage had followed, or could follow upon it; therefore the action was foolish and wrong-headed.”

The *code penal* of France visits with penal censures all calumnies uttered in public places, or published in writing or in print, which impute facts which are the subject of criminal or correctional process, or which would expose another to the contempt or hatred, *ou mepris ou à la haine*, of the citizens :—

If the fact imputed be punishable with death, perpetual hard labour, or deportation, the calumniator is liable to imprisonment for from two to five years, and a fine of from 200 to 5000 francs. In other such cases, to an imprisonment of from one to six months, and a fine of from 50 to 2000 francs.

Injurious expressions, which impute a vice but no precise fact, if so published, subject the offender to a fine of from 16 to 500 francs.

All other injurious and outrageous expressions, which want the double character, *de gravité et publicité*, are delicts of simple police.

The *veritas convicii* cannot be pleaded generally; on the contrary, every imputation is presumed to be *false* which is not legally established in the due course of law, but if pending a proceeding for such a calumny, the defendant shall denounce the complainant, proceedings shall be stayed till the charge be decided.

And in case the fact imputed shall be proved to be true, the author of the imputation shall be exempt from all punishment.

(*w*) By the laws of Solon, it was forbidden to defame another in public places, under a penalty of three drachmas to the party injured and two to the treasury. *Lege sanxit Solon ne quis de alio detrahat in locis sacris in judiciis, in magistratum concessibus, & in spectaculis, qui secus faxit ei de quo detraxit multam pendat drachmas tres, & ærario publico duas.* Pettit. in *Leg. Att.* 535.

In such instances, the truth or falsity of the charge seems to have been immaterial; the compensation was paid in respect of the public insult. In other cases, a fine of two drachmas, as it seems, was imposed, in respect of mere light and trivial charges, whilst in respect of graver ones, and where a crime of legal cognizance

[*xxxiii] published *to be essential to the remedy; in other words, ought its truth to afford an answer to the claim,

was charged, a much heavier fine was imposed. But, in either case, the fine was conditional, viz. unless the defendant proved his charge to be true. The law was του λεγοντα κατως εαν μη αποκατανη ες εστιν αληθῆ τα ειρημενα ζημιουεσθαι. Qui de alio detractaverit, ni probarit verum esse quod objecit probrum, multatur. But it was enacted, τους λεγοντας τι των ΑΠΟΡΡΗΤΩΝ πεντακοσιας δραχμης οφειλειν. Non licebat igitur alteri exprobare ea quæ si quis patrasset in eum insurgebant leges & animadvertabant nisi, ατ οφαιρειν ες εστιν αληθῆ posset apud iudices. Pettit. ib.

In respect of some other specific charges, a fixed penalty was also payable. Vetitum quoque lege erat alteri objicere quod clypeum abjecisset qui hoc convicium fecerit quingentis drachmis multabatur.—ΕΑΝ ΔΕ ΤΙΣ ΦΛΑΣΚΗ ΑΠΟΒΕΒΑΗΚΕΝ ΑΙ ΤΗΝ ΑΣΗΛΙΑ ΥΗΟΔΙΚΟΝ ΕΙΝΑΙ.

The same laws also contained an express provision against a calumnious charge of homicide. Nam homicidæ omnibus civitatis juribus sacris pariter & publicis excedebant, ita ut ne illos quidem alii alloquio dignarentur. Pettit. ib.

Whether, according to the Roman law, the truth of a defamatory charge made against an individual afforded a complete defence, without reference to the motive and intention of the publisher, has, it is well known, been doubted. And yet the authorities seem to weigh strongly in favour of the affirmative of the question, as well in reference even to the criminal as to the civil action. The general doctrine appears most clearly, from the celebrated response of Paulus, which was imported into the digest. “*Enm qui nocentum infamavit non esse bonum æquum ob eam rem condemnari peccata enim nocentium nota esse et oportere et expedire*; for though, according to Matthæus, “*Solet Paulus in disserendo, σκοτικος seu obscurus esse*,” yet his meaning is in this instance too plainly expressed to admit fairly of any doubt, notwithstanding the interpretation attempted to be imposed upon the words by his numerous commentators. Some of them have asserted, that the response must be limited to the charging offences, the detection of which is of importance to the state; but the plain and obvious meaning of the terms repels such a restriction; the word *peccata* naturally comprehends every species of delinquency, whether it be against law or morals, and is not confined to the admissum crimen, or delictum, by which legal delinquency is so frequently described.

Thus Matthæus, in his treatise De Criminibus, cap. 1. makes *peccatum* the genus, crimina & delicta species, and he observes “*sunt peccata quædam ita levia ut ea queramus magis quam exequamur ut legibus quoque nulla sit imposita pœna. cujus generis si quis requirat inveniat sequentibus locis, 1. si quis 14. § Divus D. de Relig. et sunt fun. 1. 3. § non perpetuæ, D. de sepul. viol. 1 verum est. 39. D. de furt. sunt alia quæ legibus vindicantur non unâ tamen omnia severitate.*” These and many other authorities, which might if necessary be cited, show clearly that the *peccatum* of Paulus was not to be restrained to the highest and most penal offences. See Cic. de Finibus, 4. Horat. Sat. 1. Even if the sense were doubtful, it would be absurd to adopt a construction the effect of which would be to permit a man to justify by proving the truth, where he had imputed the commission of a monstrous

either absolutely *or with qualifications? By the law [*xxxiv] of England, which, in this respect, conforms with, as it

crime, but to exclude him from a similar defence when he charged one of inferior magnitude. If a man may justify a charge of murder, by proving it to be true, why should he not be permitted to do the same when he has imputed robbery or theft. If the public are interested in knowing the character of a murderer, have they not also some interest in knowing that of a thief? The reason for allowing truth to operate as a justification, is still stronger where the alleged slander does not impute any misconduct of legal cognizance; for there the public cannot be put on their guard by means of a judicial charge. Others again have urged that the response must be construed with the annexation of this condition, that the imputation be not made *animo conviciandi*. And the rescript of Dioclesian and Maximian has been cited in support of this limitation. “Si non convicii consilio te aliquid injuriosum dixisse probare potes, *fides veri*, a calumniâ te defendit. Si autem in rixam inconsulto calore prolapsus homicidii convicium objecisti, et ex eo die annus excessit, cum injuriarum actio annuo tempore prescripta sit ob injuriæ admissum conveniri non potes.” The true construction of the words *fides veri*, seems clearly to be, not as some would have it, that the truth shall be a defence, provided the alleged slander was not published with intent to defame, but that proof of the absence of such an intention shall be a defence. The words *fides veri* do not refer to the proof of the truth of the defamatory matter, but to proof of the circumstance stated by Victorinus, namely, that he had imputed the crime of homicide,—non convicii consilio. C. Victorinus had inquired whether he should be amenable if he could prove that he uttered the words without the animus infamandi? The answer was, that if he could establish the truth (not of the charge but,) of the circumstance which he relied on, i. e. the absence of an intention to defame, that proof would serve for a defence. It is scarcely necessary to observe that the plain and literal construction of the words of Paulus derives confirmation from the celebrated dialogue between Horace and Trebatius.

Trebatius : “ *Sed tamen ut monitus caveas, ne forte negoti
Incutiat tibi quid sanctarum inscitia legum.
Si mala condiderit in quem quis carmina jus est
Judicium que.*” —

Horatius. “ *Esto si quis mala, sed bona si quis
Judice condiderit laudatur Cæsare, si quis
Opprobriis dignum laceraverit integer ipse.*”

Trebatius : “ *Solventur risu tabulæ : tu missus abibis.*”

The very nature of the penalty imposed on a libeller, by the Cornelian law, supplies an argument tending to a similar conclusion : he was to become *intestabilis*, that is, incapable of giving testimony in a judicial proceeding. But why *intestabilis*, if he had published merely the truth? To exclude one from giving testimony who had, by a *false* and malicious charge, attempted to deprive another of his character, would at least be a consistent and plausible provision, but it would be a strange reason for rejecting a witness, that he had published what was *true*, even though he had done it maliciously.

[*xxxv] seems, the *rule of civil law, the truth of the alleged slander is an absolute answer, or bar, to the claim to

With respect to those judicial but anonymous charges of capital offences which came within the description of *Libellus Famosus*, (see the Constitutions de *Libellis Famosis* in the Theodosian Code, particularly the 4th and 5th,) the author, when discovered, not only might, but was obliged, at the peril of his life, to prove the truth of the charge. Thus, according to the first constitution in the Theodosian code, “*Si quando famosi libelli reperiantur nullis exinde calumnias patiantur ii quorum de factis vel nominibus aliquid continebunt, sed scriptiois auctor potius reperitur et repertus cum omni vigore cogatur his de rebus quas proponendas credidit comprobare, nec tamen supplicio etiam si aliquid ostenderit subtrahatur.*”

It is observable that the latter branch of this constitution directed that the author of the anonymous charge should not escape without punishment, even though he proved the charge to be true; yet this was no doubt intended to be awarded in respect of his misconduct in the first instance, in making an anonymous charge, when he was able to convict the guilty party, it does not by any means appear, that, having proved the truth, he was subject to the same degree of punishment as though he had not given such proof; indeed, the very contrary may fairly be inferred. Even this provision found no place in the Justinian code, which, so far from inflicting punishment on the author of the *Famosus Libellus*, when he had disclosed his name and proved his charge, deemed him to be worthy of praise and reward. “*Sanè si quis devotionis suæ ac salutis publicæ custodiam gerat, nomen suum profiteatur, & quæ per famosum libellum persequenda putaverit, ore proprio edicat, ita ut absque ullâ trepidatione accedat, sciens quidem quod si adsertionibus suis veri fides fuerit opitulata, laudem maximam et præmium a nostrâ clementia consequetur; sin vero minimè vera ostenderit capitali pœnâ plectetur.*”

Consistently, however, with the response of Paulus, the Roman law contemplated many instances of the *convicium* and *libellus* which were visited civilly as well as criminally, notwithstanding their truth. Thus it was in all cases where the publication was in its own nature injurious and illegal, and where no advantage was to be derived from publicity. “*Sin autem quod obijcitur innotescere nihil interest, puta si alter pœnam delicti sui sustinuerit aut in vitium naturale obijciatur claudus aliquis luscus aut gibbosus vocetur, veritatem convicii non excusare quo minus animo injuriandi id factum præsumatur, contrarii tamen probationem hic admittendam.*” *Vinn. Comm. in Just. Inst. lib. 4. tit. 4.*

The law of England differs from the Roman law in regard to the effect of the veritas *convicii*, in two respects, first, that the former repels the civil remedy in all cases where the imputation is true (except, perhaps, in the case of a conviction and subsequent pardon:) the Roman law, on the other hand, limited the defence to those cases where the public were benefited by the divulgence of the truth. By the Roman law, the personal affront, or contumelia, to which the *consilium conviciandi*, the *animus infamandi*, or *injuriandi*, were essential, constituted the basis of the proceeding criminal as well as civil: the benefit which society would derive from the exposure of evil-doers, was, on grounds of policy, in either case, a legal bar to the proceeding; but it was one which, in its nature, was not available where the imputation was of such a nature that notoriety was unimportant. The law of England,

damages. But *in some other countries, even those [*xxxvi] which recognise the authority of the civil law, the

on the other hand, considers the damage consequent on the slander, whether actual or presumed, as the basis of the civil remedy, and denies the remedy where the imputation is true; partly, perhaps, adopting the same rule of policy with the civil law, but chiefly, as it seems, on the general consideration that, where nothing more than the truth is published, any damage or loss consequent upon it cannot, in point of natural justice, or at least of civil policy, and on grounds of general utility and convenience, be attributed to the mere publisher of the fact. The same considerations tend to explain another broad distinction between the law of England and the Roman law, connected with the present subject; according to the latter, when the truth of the alleged slander operated as a defence against the civil action, it operated also equally as a defence against the criminal proceeding; whilst, on the contrary, though the law of England constitutes the truth universally a bar to the civil remedy yet the general rule is, that this consideration affords no defence upon a criminal charge. The civil law made the personal insult or contumely indiscriminately the basis of criminal and of civil liability, consequently the justification, which on grounds of public policy exempted a party from liability in the civil proceeding, operated with at least equal if not greater force to protect him from penal consequences. The law of England, on the contrary, places civil and criminal responsibility on distinct grounds, regarding the mischief to the private individual as the basis of the former, the mischief to society the foundation of the latter; and though in the criminal proceeding, the law does not by any means lose sight of the consideration that the public is benefited by the exposure of delinquents, and on this ground as it seems does not visit mere oral defamation penally, yet in case of written defamation the mischief which would result to the public, for want of restraint, is the ground of imposing restraint, and this operates even where the defamatory matter is true. The law, in effect, proceeds on a presumption that a greater degree of mischief would result to society from permitting the truth of written slander to operate as a justification in such a case, than that which arises from a partial suppression of truth. But although it is now a well established rule of the law of England that truth is no defence to a criminal prosecution for calumny, yet it seems to be at the least doubtful whether a different rule did not formerly prevail even in this country.

By a law of Alfred, the inventor of *slander* was liable to expiate his offence by the loss of his tongue, unless he redeemed it by the price of his head. *Si quis publicum mendacium confingat et ille in eo firmetur nullâ levi re hoc emendet sed lingua ei excidatur nec minore pretio redimi liceat quam capitis æstimatione.* Wilkins, Leg. Ang. Sax. 41. pl. 28. See also the law of Edgar, Lamb, Saxon Law, 64. And by a law of Canute “*Et sequis alterum injuriâ diflamare velit ut alterutrum vel pecunia vel vita ei diminuatur si tunc alter eam refellere possit perdat linguam suam nisi illam capitis æstimatione redimere velit.*” Wilk. Leg. Ang. Sax. 186. Bracton, in the reign of Henry the Third, states the law under the head of *injuria* nearly in the language of the Institutes.

“*Fit autem injuria non solum cum quis pugno percussus fuerit verberatus vulneratus vel fustibus cœsus, verum cum ei convicium dictum fuerit vel de eo factum carmen famosum et hujusmodi.*” It was, therefore, not improbable that the *veritas*

[*xxxvii] truth of the calumny *is regarded but as a qualified defence subject to several modifications (x).

convicii was, in conformity with the civil law, allowed generally by way of plea or exception. Again, from the language of the statutes de scandalis magnatum, the first of which was in the third year of Edward the First, the offence against which they were directed, was the spreading of *false* news, rumours, or tales, and this object plainly appears also from the st. 2. R. 2. st. 1. c. 5. "Of the devisers of false news, and of *horrible and false lies* of prelates, dukes, earls, and barons, and other noble and great men of the realm, or of the things which by the said persons never were *spoken or done, or thought*, &c. it was enacted that none under grievous pain, &c.;" whether these be considered as introductory of a new offence, or but as declaratory of the former law, it is not easy to suppose that falsity was a necessary ingredient in order to bring an offender to justice, for scandalizing the magnates of the realm; whilst in ordinary cases falsity was not essential; in other words, that the king and his nobles were worse protected against defamatory attacks than the rest of the community. The earliest judicial authority in this country, for saying that truth is no answer to an indictment for a libel, appears to be the resolution in the case *De Libellis Famosis*, 5 Coke, 125; and from that time the rule, which seems to be one of policy and convenience, has been strictly adhered to.

(x) Whatever of doubt existed among the Roman jurists as to the effect of pleading the *veritas convicii*, and in addition to this, all the doubts created by the conflicting opinions delivered by the numerous commentators upon the Roman law, have been imported into the laws of those countries which have adopted the rules of the Roman law on this subject.

Even the law of England has not unfrequently been obscured by difficulties plainly derivable from this plentiful source. It was long before the distinction was completely settled in this country, that truth was a complete justification in a civil action, though it was no defence to a prosecution for a libel; the doubts on this subject were evidently attributable to the civil law doctrine, which, in a great measure, confounded civil with criminal liability, and made the same justification apply to either.

The law of Scotland affords a strong illustration of the obscurity and difficulties which have resulted to those who have embraced the doctrines of the civil law and its commentators. Mr. Borthwick, in his very able and excellent work, on the Law of Slander and Libel in Scotland, where he treats of the plea of *veritas convicii* and the obscurity under which it labours, does not hesitate to ascribe that obscurity to the conflicting and unsatisfactory opinions which the commentators on the Roman law have delivered in reference to this subject. He truly says after Matthæus (*De Crim.*) "*Ad glossographos frustra aspexeris garriunt enim magnas nugas totoque ælo aberrant mente jurisconsultorum Pauli et Ulpiani.*" And he concludes, "Hence we may account for the opposite opinions as to the right to plead, and the effect of proving the *veritas convicii* which have been supported by Scottish lawyers amidst the great learning and infinite ingenuity to be found in the printed pleadings, which have taken place in some of our laws on the subject of libel and slander; they borrowed their authorities, to a considerable extent, from these Glossographi, and the law of England, to which the pleadings in the Scotch cases contain also frequent ex-

*The importance and interest which belong to the [*xxxviii] question, may warrant a few observations tending to

amples of reference, has, on this point, not served to preserve us from contrariety of decisions; for it also has had its fluctuations as to the competency and incompetency of justifying the charge in cases of defamation." Mr. Borthwick, in tracing the law of Scotland on this subject, refers to two ancient acts of the Scotch Parliament, which as he justly observes, seem to indicate the favour shown by the common law (of Scotland) to the admission of the plea of *veritas convicii* as an exculpatory defence, even in some instances of criminal prosecutions.

The first of these is the act of 1540 c. 104. "The pains of judges that dois wrong, and of them quha slanders them wrongously" and the act provides that, "gif any manner of person murmuris (defames. see Hume's Comm. 334, 400.) any judge, temporal or spiritual, alsweil lords of session as utheris and *proovis not the samin sufficiently*, he shall be punished in suitable manner and sorte, as the said judge or person whom he murmuris; and shall pay any paine arbitral at the will of the king's grace for the infaming of sic persones." And by the act 1587, c. 49, which narrates in the preamble the odious crime of treason, and on the other hand, that "the malicious accusers of *innocent persons* are nocht to be credited, but severely punished, therefore the act proceeds: it is statute and ordained by our soveraine lord and the three estates of the present parliament, that quhaever accuses anuther person of treason, the party calumniate being called, accused, and *acquite* of the said crime of treason, the accuser shall incur the same crime of treason quhair of he accused the uther." It has already been observed that the statutes of *scandalum magnatum* which makes the *falsity* of the charge part of the description of the offence and which have been considered to be declaratory of the common law of England, afford probable reason for inferring that, by the ancient common law, falsity was essential to criminality, in case of personal defamation. But though the civil law is recognized by the law of Scotland, it is remarkable that, according to the modern practice in Scotland, the plea that the facts were true, is not a complete answer to a criminal prosecution for libel, (Borthwick's L. L. 250.) and that, even in the cases of contumelious words spoken in the heat of a dispute and to the person's face, the truth of the injurious words seldom absolves entirely from the punishment. Erskine's Principles, b. 4. tit. 4. sec. 45.

To this extent, therefore, the Scotch jurists have deviated from the Roman law, which seems equally to have repelled both criminal and civil actions where the charge was true. With respect to the effect which the law of Scotland attributes to the *veritas convicii*, in civil actions, Mr. Borthwick, after stating the various decisions and opinions upon this vexatissima quæstio: upon which lawyers of the greatest eminence have differed, adds, that some of them have thought that the law had not arrived at such a degree of maturity, as to possess any general rule upon the subject.

It seems, however, to be a general rule of the law of Scotland, that the truth of the imputation shall never be admitted as a justification, unless some circumstances appear in the case which afford a presumption of the defender's want of malice, or at least to make it appear that whatever his secret feelings were, he acted with a view to some beneficial purpose. And, secondly, that the truth is not admissible,

- [*xxxix] *show the reasonableness and expediency of the rule adopted by the law of England in this respect—of
- [*xl] withholding *the remedy in damages in all cases where the imputation is true.
- [*xli] *That no right to damages can, on general principles, be founded on a publication of the truth seems to follow,
- [*xlii] *simply from the consideration that the reason for award-
- [*xliii] ing damages in every such case fails. The right *to compensation, in point of natural justice, is founded on the deception and fraud which has been practised by the defendant to the detriment of the plaintiff.
- [*xliv] *If A. falsely and maliciously allege that B. has committed a crime punishable by the law, and, in consequence of that false assertion B. suffers imprisonment, he is, in point of natural justice, entitled to compensation, in respect of the injury thus wrongfully occasioned. But if A. were truly to assert that B. had committed that crime, and, in consequence, B. were to be imprisoned and punished, it would clearly be contrary to justice and reason that A. should be bound to make compensation. It would be manifestly absurd and unreasonable that the law should first impose a penalty on B. for his delinquency, and then entitle him to recover the amount, or an equivalent compensation from A. It is, therefore,

even to the extent of mitigating the damages where the inference of malice is too strong to be capable of being redargued.

The plain and simple rule of the law of England, which constitutes the truth an absolute bar to the action for damages, seems to possess considerable advantages over the corresponding law in Scotland. Its application is comparatively simple, as depending on the mere matter of fact, whether the charge be true or false; whilst on the contrary, by the law of Scotland, a previous question frequently of a difficult and perplexing nature, is first to be decided by the court as a matter of law, that is, whether the proof of the fact be admissible or not. The admissibility of the proof, being a question of law for the opinion of the court, must necessarily induce a multitude of decisions, each being in itself a precedent for future ones. And even where the question of admissibility has been decided in the affirmative, proof of the truth, by the Scotch law, is not conclusive, but is merely allowed to operate as auxiliary evidence in order to rebut the inference of malice.

This doctrine of the Scotch jurists, that the truth is material only so far as it redargues or rebuts the inference of malice, is obviously founded upon the notion of the civil law, that the essence of the injury consists in the contumely, insult, or personal affront.

the deception which has been practised by A., and the *falsity* of his communication that makes the difference, and which constitutes B.'s title to damages. So, in general, whoever wilfully and falsely ascribes misconduct or evil principles to another, is guilty of fraud and deception towards society, which possesses an interest, in truly knowing and estimating the conduct and character of its various members, and is guilty also of an act of injustice towards the individual, because the imputation tends to lower and degrade him from his proper place in society, and to exclude him from the advantages to which, as a member of *society*, he is just- [*xlv] ly entitled (*y*). When, therefore, a loss or damage ac-

(*y*) The sin and mischief against society may consist in deceitful commendation as well as in unmerited censure. One who falsely and wilfully recommended an ignorant profligate to a patron of a benefice, as a fit and proper person to be preferred, would as much offend against morals and the interests of society, as if he had prevented the preferment of a learned and conscientious man, by maliciously defaming him. The sin and mischief to society would be at least as great in the former case as the latter, although no one in particular could show, in the former, that he had sustained any absolute temporal loss, in consequence of the fraud. If, indeed, any temporal loss were to be occasioned by such a deceitful and fraudulent statement, then it would be both morally and politically expedient that the loss should be borne by the party who had occasioned it by his wrongful and immoral act.

This plain and obvious principle is fully recognized by the law of England, as indeed it was by the civil law, in a variety of instances. Thus, if A. were fraudulently to induce B. to give credit to C., by representing C. to be a person of wealth and credit, though A. knew him to be insolvent, he would be responsible to B. for any loss which he might incur from having trusted to A.'s representations.* And if one were to give a false and undeserved character of a servant for honesty, where he knew him to be a thief, the party imposed upon having sustained damage from the misrepresentation, would, no doubt, be entitled to compensation from the author of the deceit. The great principle is, that where temporal loss is occasioned by *fraud*, reparation ought to follow ; to this extent the moral and municipal law concur. Compensation to an individual, in respect of damage occasioned by a false representation of his character or conduct, is one class of cases which fall within this great principle, and in this, as well as all others, it is the *fraud* or *dolus* which gives birth to the right.

If A. were to inquire of B. as to the credit and solvency of C., B. would be guilty of an immoral and fraudulent act, as well in recommending C. for his honesty and wealth, when he knew him to be dishonest and insolvent, as in wilfully misrepresenting him to be dishonest and insolvent, when he knew the contrary to be true. Justice requires that reparation, in the one case, should be made to the *deceived*, in the other, to the *slandered* party.

* On grounds of extrinsic policy, such an action is now confined by the provision of the late act, to cases where the fraudulent representation is in writing.

[xlv] crues from such a misrepresentation, it is *consonant with reason and natural justice, that the author of the mischief should be bound to repair it.

But the right of the calumniated individual to receive a compensation must, in all cases, obviously depend on the consideration, that by the fraud of another he has been deprived of that which he was otherwise justly entitled to enjoy ; and the title to compensation must therefore cease, when the truth of the imputation is inconsistent with the right of enjoyment.

If a man commit profligate and wicked acts, upon what principle can he bind the rest of mankind to silence, or demand damages, should his real character be divulged ? How can any right or interest be claimed in a false character, founded in fraud or hypocrisy, and subsisting only through ignorance ? In short, in such a case, that fraud of which an innocent man would justly be entitled to complain, were his conduct or character to be misrepresented, attaches to the guilty complainant who would suppress the truth ; to the hypocrite who would maintain the show of religion ; to the profligate who would be esteemed moral ; to the villain who assumes the character of an honest man, and not to him who plucks off the mask and exhibits the delinquent as he is (z).

[*xlvii] *Were the truth to be no defence, it would follow that a guilty man would be entitled to far greater damages, in respect of a true representation, than an innocent man could claim, in respect of a false one ; the probability of conviction and of punishment would be far greater in the former than in the latter case.

Again, in point of natural justice, it is an understood condition, in all the various dealings and intercourse of society, that every one is what he appears to be, in all cases where exterior appearance can be supposed to have any influence in such dealings ; and, therefore, whenever an advantage is obtained by virtue of a false appearance, that advantage having been gained by a species of moral fraud, cannot be the subject of right.

(z) Cum autem duobus modis id est aut vi aut fraude fiat injuria, fraus quasi vulpeculæ vis Leonis videtur, utrumque homine alienissimum sed fraus odio digna majore. Totius autem injustitiæ nulla capitalior est quam eorum qui cum maximè fallunt ipse agunt ut viri boni esse videantur. Cic. de off. 1. 1.

In the next place, how does the question stand upon grounds of public policy and convenience? If an individual has a right to protection against calumnious and injurious misrepresentations, is it not, on the other hand, conducive, if not essential, to the welfare of the community, that the characters of individuals should be truly estimated? If it be an offence against an individual to degrade him from his place and condition in society by wilful misrepresentation, is it not also an offence against society to raise an unworthy member to advantages and honors which he did not deserve, either by false commendation or peremptory injunctions to silence?

It has already been observed, that a state of society is one of mutual confidence, in which each must trust others for the effectual discharge of every duty of civilized life. It is obvious, that where individuals have an interest in being truly represented, in order to enjoy a degree of confidence and esteem proportioned to their *merits, the public have a mutual and correlative [*xlvi] interest in truly knowing where trust may be safely and beneficially reposed.

It is plain, that members of the same community have an interest in mutually knowing the characters of those with whom they are to associate, for all the various purposes and relations of civilized life. The common imperfections of our nature, and the want of opportunity, to a great extent prevent the mass of mankind from acquiring a just knowledge of the characters of each other by every man's own observation and judgment; and the difficulty is further increased, by the consideration that the most dishonest and worthless members of society, at the same time, use the greatest exertions to preserve a fair exterior.

What greater encouragement, on the other hand, could be afforded to the exercise of every evil propensity, than that the actions of the wicked should be veiled in darkness, and that the good and the bad should mix in society, without the possibility of discrimination, that the apprehension of disgrace should cease to operate as an incentive to good conduct, and that the honest and virtuous part of society should no longer be put on their guard against the practices of the fraudulent and the depraved?

Let it, for a moment, be considered what would be the moral con-

sequences of a general prohibition to publish the truth. There is, perhaps, no other feeling so strong, so universal, and so influential, as it were, on the actions of mankind, as the love of reputation. That laws, without morals, are vain and unprofitable, is an ancient position, which has been amply confirmed by the experience [*xlix] of every age and every country; that mere abstract moral, or even religious principles, unassisted by the dread of censure, would be insufficient motives to good conduct in respect of the moral but undefined duties of social life is equally certain.

What are the great practical restraints which tend to the observance of legal and moral duties in a state of society? Within the narrow sphere of the municipal law, men may be deterred negatively from doing evil, it may be, in some few instances, compelled to do positive good, by the apprehension of penal consequences, sufficiently certain and severe to enforce obedience.

Religious and moral principles, on the other hand, though universal as rules of conduct, want the aid of temporal and immediate inducements to their observance. There is, in fact, a large portion of mankind, which, beyond the mere limits of absolute and peremptory laws, scarcely owns any other restraint than the fear of public censure and its *consequences*. But the love of fame, reputation, and character, is a motive of human conduct as powerful as it is universal, extending to every action which can be the occasion of praise or of blame, to all ranks and conditions,—who is free from its mighty influence (a) ?

Its operation is co-extensive with the moral law, whilst its inducements are of a present and powerful nature; on the one hand, promising temporal prosperity; on the other, threatening destitution, disgrace, and ruin.

[*1] *To reject the moral aid arising from a feeling so universal and so strong, that it may well seem to have been conferred in order to adapt us to a state of society, would be no better than an extravagant and irreparable waste of moral power

(a) Quid philosophi nostri ? nonne in his libris ipsis quos scribunt de contemnendâ gloriâ sua nomina inscribunt ?

which might have been most usefully and beneficially applied to public advantage.

It were, however, to regard the operation of this great principle, in a very limited and confined view, were its influence to be considered merely in reference to the immoral and unprincipled; the policy is well warranted by experience, which subjects even the best and most enlightened of mankind to its powerful control.

The fear of censure may, in effect, be regarded as a moral force, which operates strongly, constantly, and uniformly to the public good, in opposition to base and unworthy motives; the best are not above (*b*), and even the very worst are scarcely below, its salutary influence.

To prohibit all communications concerning those actions of mankind which deserve censure, would be to make every bad man pass current for a good one, to provide a mask, under which every profligate and designing hypocrite might practise with security on the innocent and the unwary, it would be to repeal one of the great moral penalties against vice, the reprobation of the just, and consequent exclusion from their society; it would be to offer the highest possible premium for the encouragement of hypocrisy, to efface, as far as possible, all exterior distinctions between vice and *virtue, and to mix and confound together the virtuous and the vicious to the common detriment of all (*c*). [*li]

(*b*) *Negligere quid de se quisque sentiat non solum arrogantis est sed etiam omnino dissoluti. Cic. de Off. 1.*

(*c*) It may further be observed, although it seems to be unnecessary to dwell on the subject, that if a remedy in damages were to be awarded where the imputation is true, part would be given in respect of the plaintiff's own delinquency; for the truth of the fact, as well as the mere publication of it, have concurred in effecting the privation, and thus the complainant would be allowed to make gain of his own wrong. It is plain, also, that damages ought not to be given commensurate with the privation, for that was the proper consequence of the plaintiff's misconduct, and might have followed, though the fact had not been disclosed by the defendant; it ought, in justice, to be proportioned to the probability that the wrong doer would otherwise have enjoyed impunity. If A. were to commit a crime, and B. were to publish the fact, in consequence of which A. suffered loss and imprisonment, it would manifestly be unjust that B. should make full compensation to A. for that consequence, where a great probability existed that the same consequences would have followed from inquiry and detection in the ordinary course of justice.

Another objection to the admitting the action for damages, where the communication is true, must be confined to those cases where the municipal law annexes any legal quality or efficacy to character, as the law of England does, where it admits evidence of good character, as tending to diminish the probability of guilt on a trial for a crime. It would be in the highest degree, inconsistent and absurd, that the law should, in the first place, secure to every man a good character whether he really deserved it or not, and should, in the next place, make that good character to operate as evidence of his innocence. In strictness, indeed, general reputation, as to character in society, would cease to exist, as soon as mankind were [*lii] enjoined to observe *perpetual silence, as to all which any member of that society had done amiss.

Cases of hardship may still be urged where no public benefit can arise from exposure, and where the suffering party is deprived of advantages which he might legally have enjoyed. For instance, where a delinquent has, by many years of penitence and good conduct, retrieved his character in society, to give a wanton, unnecessary, and renewed publicity to the circumstances of his offence, whilst it would overwhelm him with disgrace and ruin, might be productive of no real benefit to the public. And it may be urged, that the affording a possibility to those who have acted criminally, of retrieving their errors and reinstating themselves in society by a course of good conduct, is to hold out a temptation favourable to the interests of morality. To a certain extent, and in a moral point of view, such observations are well founded; they afford, however, too uncertain and indefinite a foundation even for a particular and limited exception to a general rule, still less do they warrant a total rejection of that rule. How could such an exception be limited and defined? How many years of abstinence from crime, or even of positive good conduct, shall be sufficient to purify the tainted reputation of a criminal? At what period shall the law ordain that his misconduct, though not forgotten, shall no longer be mentioned, and ever after enjoin perpetual silence, under the penalty of an action for damages, to which truth shall afford no answer? Must not the period be proportioned to the nature and heinousness of the offence? Were such a limitation practicable, would not

many a villain derive a sanction and protection from *the [*lii] law, though his vices were latent, not eradicated, and would not numerous opportunities of doing harm be afforded by imposing silence, which would have been excluded by exposure. It is in all cases dangerous, frequently fallacious, to draw general conclusions from cases of individual hardship; in the present, it may well be questioned, whether, even in the particular instances adduced as examples, the community would derive no benefit from publicity, and whether a delinquent, under any circumstances, or at any time, has, in point of moral justice, a claim to be placed in the same situation, as to character, with those who have never offended.

It may, perhaps, be objected, that several of the arguments which have been thus used in support of the general position, that the publication of truth can in no case warrant an action for damages, assume that the complainant is in law or morals a *delinquent*, but that it frequently happens that a man's interests may be seriously affected, and his comforts and happiness greatly diminished by the publication of that which is true, but which is not imputable to him as a fault. This may readily be admitted, and it may be added, that a man sins grievously against morality, who, for the purpose of creating misery, publishes, concerning another, even that which is true; but it is to be recollected, that the question at present is not as to the moral, or even legal delinquency of one who publishes the truth, with a malicious design to create mischief, but whether the party, concerning whom nothing more than the truth is published, has such a right to privacy and concealment, as shall, even in point of reason and natural justice, entitle him to a compensation in damages from one who publishes *the fact. [*liv] Now, it may be observed, in addition to any arguments derived from considerations of external policy and regarding the question merely in reference to the right to civil remuneration, that if any injury or inconvenience accrue from publicity, in such a case, it must consist either in a mere injury and annoyance to the feelings of the complainant, from a sense of wounded delicacy, or in the intercepting and preventing some collateral benefit, which, but for the publication of the fact, would have accrued to the party whom it concerns. In the first place, a mere injury to the imagination or

feelings, however malicious it may be in its origin, or painful in its consequences, is not properly the subject of a remedy by an action for damages; such offences being unconnected with any substantive right, are incapable of pecuniary admeasurement (*d*) and redress; they admit of no exact definition, and therefore, to extend a remedy to such injuries generally, would be productive of great uncertainty and inconvenience, and open far too wide a field for litigation (*e*). In the next place, it seems to be clear, that a party who acquires an advantage by concealing the truth, which he could not have attained to had he divulged it, so far is guilty of fraud in the

[*lv] concealment, that he cannot, upon any *principle, claim a right to acquire that benefit, and therefore, cannot complain that he is injured by a publication of the truth.

By way of illustration, let it be supposed that a banker, being reduced to the brink of bankruptcy by unavoidable misfortunes, a friend, in ignorance of his circumstances, offers to deposit in his hands a large sum of money, but that the friend is prevented from doing so, in consequence of a report from some third person that the banker is insolvent. Ought the latter to recover damages? What has he lost but an opportunity of committing a gross deception, by receiving the money under a fraudulent concealment of his circumstances; if he could not honestly have availed himself of the other's ignorance of the real state of his affairs, it is obvious, that he has not sustained any moral, still less any legal injury from the disclosure.

Again, suppose that one who labored under a latent and personal defect, or who was subject to some hereditary malady or disease, was prevented from forming an advantageous marriage by the disclosure of the secret by a third person, though a publication of the truth might be most offensive to the feelings, yet could it be said that any advantage had been lost to which the complainant was morally

(*d*) To such an extent is this principle carried, by the law of England, that most offensive, provoking, and insulting charges may be made *orally*, which are not the subject of an *action*, even though they are absolutely *false*. To charge a man with mere immoral conduct, however gross, would not be *actionable* in the absence of special damage, though the imputation were *falsely*, as well as *maliciously* made, see above, xxxi, note (*v*)

(*e*) See above, p. xxviii.

or conscientiously entitled? Once more, if a patron were to offer preferment to a party, under the erroneous supposition that he was a relation, when, in fact, the party to whom the offer was made well knew that he was no relation, and that the offer resulted from mistake, would it not be dishonourable and immoral to avail himself of an intended kindness, which was founded in mere error?

In these and all similar cases, where the *advantage [*lvi] could not have been obtained, but through the medium of fraud, morally speaking, it seems to be obvious that no interest exists which can be noticed even as a moral, still less as a legal right. To recognize such rights, would as little consist with the principles of morality as of political expediency, for the natural and obvious effect would be to lend a legal sanction and encouragement to the commission of fraud, by rendering the practice more easy, and by affording a premium to the party who attempted it, even in case of failure (*f*).

Finally, to make the truth operate merely as a qualified defence, never singly, but occasionally, in conjunction with other circumstances, were the practice even more consistent with the principles of natural justice than it seems to be, would be productive of great inconvenience (*g*). Happily, the ancient and undeviating

(*f*) In one instance, at least, the presumption of solvency, on the part of a purchaser, as the tacit condition of the contract, is recognized by the law of England. Every man (according to Lord Kenyon,) who contracts to supply another with goods, acts on the presumption, that that other is in a condition to pay for them; and, therefore, when the condition of the consignee is altered at the time of delivery, and he is no longer capable of performing his part of the contract, honesty and good faith require that the contract should be rescinded; and on this footing that learned judge placed the doctrine as to the right of seizing goods sold to a bankrupt or insolvent, when the vendor is able to do so whilst they are in transitu, before they have actually come into the possession of the purchaser.

(*g*) Mr. Borthwick, in his late excellent work on the Law of Libel in Scotland, with a very natural bias in favour of the laws of his own country, combats the position, that the truth ought to be an absolute bar to the claim for damages, with great force and great ability. He urges, that the reason given by Sir W. Blackstone, for refusing the action for damages where the imputation is true, viz. that the public are benefited by this disclosure, is inconsistent with the doctrine of the law of England, that a libel, though true, is punishable criminally. Now, certainly, if the reason for denying the civil remedy, in such a case, really were that of the civil law, that is, the public benefit resulting from the publication, there would, no doubt, be ground for charging the law of England with inconsistency in this respect; that, however, is not the reason.

- [*lvii] *rule of the English law on this point has protected us from an actual and intimate knowledge of difficulties, the
- [*lviii] *reality of which may be collected from the experience of others.

or, at all events, not the principal reason on which the law of England, proceeds. The principles on which the law of England, in such cases, denies the right to damages, are the plain and obvious ones, that the *fraud or deceit*, which is of the essence of the wrong, is wanting; that no man can have a right to recover damages in respect of the publication of his own misconduct, and perhaps even more generally, that no one can have a legal right or interest in the suppression of truth. The negation, therefore, of the civil remedy is perfectly consistent with the infliction of punishment, the public may be injured where the individual has no claim to damages. If a man were to wound an outlaw, the latter could claim no damages; and yet the former would be worthy of punishment, for the wanton outrage he had committed against the public peace. Mr. Borthwick further observes, that the truth of the charge is no just gauge of the injury done by the libel or slander, that though the tradesman is proved to be a bankrupt, or the physician a quack, great injury may have been done to the tradesman or physician, by the information being more widely circulated than it otherwise would have been. The answer is, that the denial of the remedy by the law of England is not founded upon the supposition, that no harm or loss has accrued from the publication of the truth, but on the injustice, or, at least, the impolicy of permitting the party who has sustained the loss, of recouping it in damages from one who has spoken merely the truth. The law, in such cases, admitting the *damnum* or loss to have been sustained, denies the existence of the *injuria*, the violation of any right which the plaintiff had.

Again, Mr. Borthwick argues, that as it is by the indiscretion, or, at least, by the malice of the defender, that his liability is to be judged of, although the truth of the charge were proved, and if no *other circumstance* but the truth were required to complete the justification of the defender, he might be absolved from the action, though the greatest degree of both culpability and malice had actuated his conduct. This objection, on the score of inconsistency, obviously assumes, that the law of England, as of Rome, and, as it seems, of Scotland, regards the *animus infamandi*, or *mens rea*, as of the essence of the offence, and it admits of two answers; 1st, the law of England, with a view to the civil remedy, principally regards the loss or damage to the person or estate, and not the contumely of the act. See Wood's *Ins.* 17, and *supra*, xxxi. note (a); *infra*. vol. 1, p. 10, where the act is wilful and noxious, malice is but a mere legal inference from the act, in the absence of facts which constitute an absolute or qualified justification, and, in many instances, an absolute justification arises from the mere facts, and malice, however intense, creates no right of action.

But, 2ndly, even were the malicious or contumelious intention of the essence of the wrong, there would be no inconsistency in repelling the action, under circumstances which, for reasons of intrinsic policy, warranted the exclusion. There cannot be a stronger instance to prove this, or one which ought to weigh more with those who profess to adopt the civil law, than that afforded by the civil law itself, which, though it regarded the contumelious intention, as the very gist and essence of the action,

*It may justly be observed, that the principle of moral [*lix]
justification is applicable only where the motive *of com- [*lx]
munication is a benevolent and sincere one, and that to

civil, as well as criminal, seems to have considered the truth of the imputation to be in itself, independently of the question of intention, a decisive bar.

In illustration of his argument, Mr. Borthwick cites the following decision of the Parliament of Toulouse, mentioned in the *Causes Célèbres*, vol. 6; *Histoire du Procès des Sieurs Saurin & Rousseau*.

“ Le parlement de Toulouse a décidé ainsi—une fille qui auroit mis clandestinement au jour un fruit de l’amour à qui elle auroit conservé la vie, pourroit se plaindre en justice du médisant qui reveleroit son deshonneur, parceque la déformation la dépouille de l’honneur dont elle jouissoit par un *faux titre*, mais *qui ne faisoit tart à personne*, sa possession étoit légitime avec ce titre coloré. Le *Fore interne* s’accorde encore ici avec *le fore externe*.”

A médisant, employed professionally and confidentially, reveals the dishonour of a young unmarried woman, whom he has secretly delivered of the fruit of an illicit amour, the court decrees, that she is entitled to recover damages for the mere defamation, as contra-distinguished from a wrong done by the breach of promise or professional confidence*, for, if the decision were founded on the latter ground, it would resolve itself into a mere question of contract or of professional duty, and would be too much limited in its circumstances, to be valuable as an illustration of a general principle. For, though the law were to award a remedy in such a case, in respect of the breach of an express or implied promise, or in respect of the violation of a legal and professional duty, it would still decide nothing on the great and general question, as to the right to damages, in respect of the promulgation of true but defamatory matters.

What, then, is the force of the reasons alleged for the decision? That the complainant being in possession of a character to which she has no title, the law ought to protect that title, *because* the possession of it injures no one. But may not undeserved character be injurious to others, may it not enable a profligate woman to form connections, even that of marriage itself, and thus to practice a cruel deceit under the mask of virtue; may she not, under the same false colour, be enabled to contaminate the principles of others of her own sex; is no injury done in causing a woman of abandoned principles to be received and accepted into the bosom of society, as a person of unblemished reputation? But even admitting that the character injured no one, does it follow that the law ought to protect it; would it not be impolitic to give protection and encouragement to laxity of moral conduct; would not the affording it be, *pro tanto*, to remove a great and efficacious restraint on immorality, the dread of censure and exposure? Again, how can a *false* title to character give a *real* title to damages for the loss of that character? Let us suppose that one of the most injurious consequences that can result from such defamation

* By the Code penal of France, art 358, physicians, surgeons, midwives, &c. who reveal secrets confided to them in their respective capacities, (except in cases where the law compels them to the contrary,) are liable to imprisonment.

[*lxi] publish even the truth, with a malicious intention *to create misery, is, in *foro conscientiæ*, an immoral act ; this

has actually been occasioned by the publication, viz. : that the party has lost the benefit of an advantageous marriage ; yet what legal ground of complaint can there be in losing that which could not have been gained but by a base and fraudulent concealment. No laws, either municipal or moral, could contemplate any right or interest in a contract made under such circumstances ; the complainant would therefore have lost nothing which the law could recognise as the object of legal protection. She would, in effect, have lost nothing but the opportunity of doing an injury by means of a fraudulent concealment of the truth. It is further observed, that the decision is in consonance with the feelings (*le fore interne*) of mankind. The feelings of individuals constitute, however, but a very indifferent forum for the decision, of cases where the judgment is liable to be warped by the particular circumstances in opposition to the general rules, which in their constant and uniform application, conduce to public happiness. The conduct of a professional man, who betrays such a secret, is, no doubt, most dishonorable, unprofessional, and immoral, such as is calculated to excite a sense of the highest indignation ; but does it therefore follow, that it would be wise to award, on that account, a compensation in damages, and to establish a general precedent on the particular hardship, without any consideration of the general principles on which the claim to damages ought to be founded ? Still less would it follow that a remedy ought to be given against one who had published the fact, without being guilty of any breach of professional confidence.

Besides, it is easy to see that the moral sense of mankind would afford no general rule for the exclusion of the truth, as a defence, but rather the contrary. Let it be supposed, for instance, that the complainant had been guilty, not as in the case cited, of a single deviation from the paths of virtue, but that she had led a life of vice and depravity in a distant country, would not the moral sense of society condemn, rather than approve, the law which allowed her to recover damages against one who had merely put society on their guard, by publishing her true character ? Would not men question the wisdom of a law which enabled one who had led an impure and profligate life, to recover damages for a reflection on her chastity ? Is any man's mind so constituted as to think it just or reasonable that a murderer should recover damages from one who had published his guilt, even maliciously ?

It follows, then, that if the mere moral sense does not always approve such a defence, it is, at all events, far from sanctioning the general exclusion. Where then is the line to be drawn ? Mr. Borthwick concludes his argument with these observations.— “ If a person is not placed in one of the situations which are called privileged, or unless he can show that what he said was uttered, for the purpose of *promoting conviviality or amusement, or in consequence of passion, inebriety, or such temporary excitement* ; and yet shall be exculpated in every case from an action of damages, for having defamed an individual, merely by proving that his expressions were true, there seems for the reasons above assigned, not only to be an *inconsistency* in the application of the legal reasoning that supports such a doctrine, but the practical consequence would seem to lead to no other alternative than to pass with impunity

is true, but this is one of the numerous cases *where it [*lxii] is questionable whether legal can be made to coincide

every act of cold-blooded calumny, provided only that it be grounded on a true statement, however prejudicial that statement might be to the sufferer, and however unprovoked, officious, and malevolent it might be on the part of its author."

Upon these latter comments, it may suffice to remark, that the supposed *inconsistency* of the doctrine of the English law on this subject having been already observed on, it would be superfluous to reiterate any observations on that subject. But it is to be most emphatically observed, that the practical consequence alleged to result from the doctrine of the law of England, that truth shall be a bar to the action for damages, by no means follows. It is to be recollected, that the criminal and civil wrongs are not mixed and complicated with each other by the law of England, as they are both by the civil law and the law of Scotland, and that, though the law of England, with cool, cautious, and steady adherence to a general principle, universally repels the action for damages, where the imputation is true; yet that the same law visits every malicious libeller with penal censures, without regard to the truth or falsity of the libel. It may, indeed, readily be admitted, that a man may indulge a wicked and malicious spirit, in publishing the truth, without incurring any liability to damages, according to the law of England: but what is the sum and substance of this objection? simply this, that the law does not award damages to be recovered in respect of an imputation truly made, merely because it has been maliciously and immorally made. This ground of complaint against the law, taken in the abstract, avails nothing; it is impossible that the municipal should be co-extensive with the moral law, so as to subject the author of every malicious and immoral act, to a civil action for damages. The very extent to which such an objection might be pushed in effect refutes it; if the suffering of a guilty party from publicity and cold-blooded malice on the part of the publisher, give a claim to compensation, it ought to be given even where a malicious party prosecutes and convicts the offender according to law, or publishes, that such a conviction has actually taken place, for many cases might be put where such a proceeding would be harsh, vindictive, and oppressive. Neither is there any inconsistency in the application of the general principle of English law to the particular case, for the ground of compensation is *loss or damage*, in respect of a fraudulent or negligent misrepresentation. The question then is, whether that general principle be a correct one, and whether the truth of the fact ought to repel an action for defamation, without regard to the malice of the publisher, and this, as has been seen, is an important question, to be determined, not by a few instances of hardship which may fall on penitent offenders, but on general considerations of public policy. Those considerations seem to weigh strongly in favour of making truth an absolute bar to compensation, both because the falsity of the charge is the true principle of civil liability, and because it would be impolitic too nicely to scrutinize the motives of those who had exposed delinquents, and impracticable to lay down definite rules, which would admit such a remedy in cases of hardship and malice, without, at the same time, affording protection and encouragement to those guilty of the most heinous and detestable crimes. If this be an error in our national jurispru-

[*lxiii] with moral boundaries. It is frequently difficult *to ascertain the true motive of an act which, in its nature,

dence, it is one which, to a great, though not perhaps the same extent, is attributable to the laws of Athens, Rome, and modern France.

Assuming that the policy of the English law, in this respect, is doubtful; what is the alternative proposition? not to reject the truth as immaterial to the defence; that is not contended for, but that the truth shall be available with certain other circumstances, which ingredients shall, in their union, supply a full and complete justification. Now, the very instance of Scotland herself, whose laws on this subject Mr. Borthwick has with great learning and great ability both expounded and defended, affords a very strong illustration of the difficulty of establishing precise and definite rules on such principles. Mr. Borthwick, with great candour, observes, that "lawyers of the greatest eminence have differed, and may continue to differ, from each other on this subject, some of whom have thought that our law (i. e. of Scotland) has not yet arrived at that degree of maturity which can put us in possession of a general rule. Future decisions will remove this difficulty." Certainly, the decisions of the Scotch courts, which Mr Borthwick has collected, conflict too much too yield any certain and definite rule; and it is observable, that in two of them, viz. *Scott v. Baillie*, Borth. 268, and *Fife v. Fife*, ib. 272, the plea of the truth was allowed to constitute a full defence. In the former case, the defender, Mrs. Baillie, had publicly, at an assembly, asserted, that the pursuer had for a long time been a woman of gallantry. Mr. Borthwick observes, that this case was afterwards disapproved of, in *Ross v. Mackerrell* (Borth. 349.): in that case the president took occasion to say, that in the case of *Chalmers*, widow of *Scott v. Baillie*, no proof of the *veritas convicii* should have been allowed, but that there was no general rule upon the subject. In the case of *Fife v. Fife*, (Borth. 272,) Fife pursued one of her neighbours for damages, for saying that she kept a house of bad fame; the defender averred that it was true. A proof was allowed, and having proved the fact accordingly, the defendant was assolized. Mr. Borthwick observes, that in this case the proof of *veritas* was properly admitted, because it was a public duty, not a malicious act, to expose the pursuer. It would, however, be very difficult to establish any definite limit on the distinction between those offences which it was a public duty to expose, and, consequently, where the *veritas convicii* ought to be allowed, and those, in the exposure of which the public had no interest. Mr. Borthwick also suggests that, even admitting *Chalmers'* case to be an authority, as far as oral slander is concerned, yet it is not an authority in case of libel which differs essentially from oral slander; and he refers to the law of England in support of this distinction, observing, that it was not until the middle of the last century permitted to a defendant to justify, in the case of written slander, (citing Lord Hardwick's dictum, in the *King v. Roberts*, Selwyn's N. P. 986.) The notion, however, that by the law of England a justification of the truth cannot be pleaded to a civil action for a libel has long been exploded, and not only so, but the soundness of the distinction of the law of England, in considering that to be actionable, when written, which would not have been so if merely spoken, has been questioned by some of the best English lawyers. And though that doctrine of English law is now too firmly established to be shaken, there can be no doubt that

may be attributable either to a good or bad motive ; *in [*lxiv] such case, it may be far better policy at once to pre-

it is an anomaly which has arisen from adopting the civil law doctrine as to libels, according to which, personal indignity, insult, and contumely, are the proper foundation of the action, whilst, according to the ancient principles of English law, the loss or damage to the party grieved, either actual or presumed, is the real foundation of the civil remedy. Mr. Borthwick, indeed, as has already been observed, very justly attributes much of the uncertainty which has prevailed on the subject of the *veritas convicii*, as well in England as in Scotland, to the conflicting and unsatisfactory opinions of the commentators of the Roman law. Borth. p. 244. Be this as it may it is very difficult, on any certain principles, to admit the *veritas convicii* as an absolute bar to oral slander, and yet to reject it as an answer to a libel.

It may be proper to observe, in this place, that Mr. Borthwick, in the course of his concluding remarks, seems to have assumed (agreeably to the civil law, probably also to the law of Scotland,) that proof that a defendant uttered the defamatory matter, complained of for the purpose of promoting *conviviality* or *amusement*, or in consequence of *passion*, *inebriety*, or such temporary excitement, would, by the law of England, furnish a defence to the action for damages. The law of England, however, does not sanction such a doctrine, and on this, as well as on many other occasions, may well boast a superiority over that code which our ancestors so wisely refused to adopt. Upon what principles of reason or natural justice, or even of artificial policy, is a man to be excused from answering in damages, where he has knowingly and wilfully occasioned mischief to another, because he did it for his own amusement, or because he was drunk, or excited by passion. It is for the law to define the rights of individuals, but when defined, nothing can be more clear, in point of reason and natural justice, than that a remedy ought to be given in respect of every wilful invasion or aggression of those rights. Is it not plain, that when the right to reputation and character is once recognized by the law, every wilful redemption of a character ought to confer a title to damages, as well as in every other instance of the violation of a recognized legal right. What legal excuse or justification then can arise from the consideration, that a man in depriving another of character, by casting the most odious imputations, on him, did it because he was in jest, or was drunk ? Though to himself it may be matter of jest, to the unfortunate object of merriment, the calumny may be utter ruin ; though uttered in joke, the charge may be reported and believed in earnest ; and intoxication, so far from taking away the sting of the calumny, may, in some cases, according to a vulgar adage even supply an inducement to belief. Finally, in support of the consistency of the superior merit of the law of Scotland, and of its consistency with the abstract principles of justice and equity, Mr. Borthwick refers to Mr. Fox's speech on the discussion, in the House of Commons, on the Libel Bill, May 20, 1791. Parliamentary History, vol. xxix. p. 575. That celebrated orator and statesman, in his speech on that occasion, admitted, that " there certainly were cases in which truth would not be a justification, but an aggravation. Suppose, for instance, a man had any personal defect or misfortune ; any thing disagreeable about his body ; or was unfortunate in any of his relations ; and that any person went about exposing him on those accounts, for the purpose of mal-

- [*lxv] some charitably in favour of innocency of intention, *than to open a field for litigation. The convenience is great,
 [*lxvi] on the one hand, of laying down a precise and *general rule ; the practical inconvenience on the other, of afford-
 [*lxvii] ing protection to a malicious act is small, when *the act, in its own general nature and effect, is beneficial. At

ice ; and that all those evils were, day after day, brought forward to make a man's life unhappy to himself, and tending to hold him out as the object of undeserved contempt and ridicule to the world, which was too apt to consider individuals as contemptible for their misfortunes, rather than odious for their crimes and vices ; would any man tell him, that in cases of that sort, the truth was not rather an aggravation ?" The justice of these observations is undeniable ; the truth of facts, which impute no blame to a party, who may, nevertheless, be annoyed and irritated by the wanton publication of those facts, can afford no justification to the aggressor in a moral point of view. Truth, as well as falsehood, may be used as the instrument of malice ; and, consequently, where the object is to restrain such contumelious reflections and abuse by penal censures, it would be absurd to make their truth a defence upon a criminal charge. It was in reference to penal restraints, that the observations cited by Mr. Borthwick were made by Mr. Fox, and upon this point the law of England agrees with that of Scotland. The controversy is upon the question, what effect ought to be attributed to the truth of the imputation, where the complainant demands a *compensation in damages* ; here it cannot be said that the truth is an aggravation ; it would be as contrary to the plainest principles of natural justice and policy, as it would be repugnant to the common sense and feelings of mankind, to say that a guilty man ought to recover larger damages for the mere assertion of his guilt, than an innocent man ought to do, in respect of unmerited obloquy, where the moral, as well as legal wrong, was enhanced and aggravated by base and deliberate falsehood. To the question, therefore, now under discussion, the observations alluded to in the debate on the Libel Bill have no application.

A comparison of the law of England with that of Scotland, does not permit the advocate for the former to object to the latter, the repelling a defence founded on the truth of the libel, in the case of a criminal prosecution ; but he may object that the *veritas convicii* ought to be received as a valid plea, in all cases where the complainant sues for damages, and that the law of Scotland, as well as the civil law, whence the rule is derived, acts on a faulty principle, in constituting not the damage to the party injured, but the contumelious intention of the calumniator, the main test for deciding on the relevancy of the remedial action ; and certainly the law of Scotland deviates from the civil law, in not allowing the plea of the truth to avail as a defence, in cases where the civil law, on grounds of policy, admitted that defence. For the language of the Digest, on this point, seems to be too clear to admit of serious doubt as to its meaning. The rule and practice of the civil law, in admitting the truth to amount to a substantive justification in the remedial action, agrees, in the main, with the rule and practice of the law of England. And, perhaps the very circumstance, that the same practical conclusion has been derived by the aid of different principles, might well be urged as a further argument in its favour.

all events, the effect of the objection is merely to deprive the author of the communication of his moral defence, and leaves the question upon considerations of general policy and convenience, just as it stood before.

In the next place, that some *communication* of the noxious and calumnious matter to a third person, is essential to the injury, necessarily results from the very notion of *damage* whether it be *actual* or *presumed*, though the extent and magnitude of the injury may depend greatly on the nature of the publication. A publication, by writing or printing, may, from its widely extended circulation and its permanency, be far more injurious than one which consists merely in oral discourse. A communication to one, or a few individuals, may be far less injurious than if the calumny were to be uttered publicly in the presence and hearing of many.

Again, an oral insult may be greatly aggravated, by the consideration that it was offered in a man's own house, in the presence of his family, or before a public assembly of friends or others whose respect he would be anxious to retain. As far, however, as the *claim to damages* is concerned, if there be an actual publication of the calumny to a third person, (for that is plainly essential to the notion of damage, actual or presumed,) *such [*lxviii] circumstances, whatever their effect may be, in enhancing the damage sustained, do not seem, in principle, to afford any material or essential test for ascertaining the title to some compensation. If *any damage* has actually resulted from a publication to a third person, other circumstances, constituting an aggravation of the wrong, cannot be material, otherwise than as they affect the question of damages; and if damage be presumed in law, and proof of actual damage be immaterial, still circumstances of extended publicity merely affect the question of degree, and not the presumption itself. If damage is to be presumed from a publication to many, some damage may also be presumed from a publication to a single individual, especially as that individual may afterwards publish the slander indefinitely. And, therefore, if the law on a presumption of a probable damage constitutes a particular class of communications substantively actionable, though no particular loss or damage can be proved, it is obvious that a communication to a third person

is all that is essential, and that the mode and circumstances of communication do not in themselves supply any obvious and natural limits for defining the extent of civil liability (*h*).

(*h*) The civil law made a material distinction, not only between *oral* and *written* defamation, but even between an injury by *writing* and one by *pictures*. Thus Heineccius, Lib. 47. tit. 10, in explaining the title in the Digest de Injuriis & Famosis Libellis, observes, "*injuriam aliam esse verbalem si quis alteri convicium adversus bonos mores facit vel fieri curat, aliam realem quæ re et facto inferitur. Ad priorem etiam, injuriam scripturâ, ad posteriorem et per picturam illata refertur.*" There seems, however, to be little either of principle or practical utility in this distinction of the civil law, which constitutes defamation by means of a *picture*, a real injury, whilst it regards a calumny in writing, though it convey precisely the same ideas, and is equally permanent in its nature, as a verbal one.

Some of the numerous commentators on the civil law have reasonably doubted the propriety of this distinction, whilst others have as strictly maintained it: the force of their arguments may be appreciated from the following example—Matthæus de Crim. tit. de Injuriis & Famosis Libellis, c. 1. s. 1.

Referenda huc et illa (Injuria) quæ fit monstrosâ et infami picturâ, nec rectè quidem picturam ad famosos Libellos transferunt tanquam muta imago non minus ac literæ loquatur; aut, ut auctor Rhetoricorum ad Herennium lib. iv. scripsit quod pictura tacitum poema sit: nam eâ ratione injuriam quæ manu telove fit, ad scriptum quoque referre posses, tanquam et vulnus loquatur et tubera capitis et vulnere obducto cicatrix.

It must, however, in fairness be observed, that this passage, in which the learned writer so entirely confounds the means with the consequence of injury, is a very unfavorable specimen of his justly celebrated and most useful treatise. The Roman law not only recognized the distinction already mentioned between oral and written defamation, but also distinguished between various circumstances of oral slander. It was termed in some instances *convicium* in others *maledictum*.—See Dig. lib. 47, tit. 10. *Convicium propriè est* (says Matthæus) *cum in cœtu aliquid dicitur aut cum vociferatione pluribus vocibus in unum collatis quasi convocium: quod autem non in cœtu nec cum vociferatione fit maledictum tamen est si fit adversus bonos mores civitatis*, d. l. 15. § *Convicium et § sive unus*. Quinimo etsi naturâ non sit contra bonos mores civitatis *locus* tamen et *modus* efficere possunt ut convicium. Ex. gr. Idoneum delitorem appellare non est convicium: sed facere id in publico et cum clamore. *Cedo fœnus, redde fœnus, fœnus reddite. Daturine estis fœnus actutum mihi; Date mihi fœnus: convicium est.*

This distinction between the mere *maledictum* and the *convicium*, was not, it must be admitted, unreasonable, especially with a view to the protection of the public peace: many expressions may be used in private, the noticing of which would be beneath the dignity of the law, as being too trifling and unimportant to require judicial cognizance, and yet the very same words spoken before a large assembly, might not only be likely to produce serious and injurious consequences to the individual, but also to provoke him to acts of personal violence. The distinction between the *convicium* and *maledictum*, is not recognized by the law of England.

*In the next place, do any and what limitations naturally arise from a consideration of the *motive* and *intention* [*lxix]

In the case of *Jones v. Herne*, 2 Wils. 87. *Infra*. 24. Willes, C. J. observed, that if *it were res integra*, he should hold that the calling a man a rogue, or a woman a whore, in a public company, was actionable. Yet his mode of expression clearly showed that he considered the law as established to the contrary. And it is not improbable that more would be lost than gained by the introducing a distinction which would be subject to great uncertainty. The doctrine of the Roman law, on this subject, was exceedingly lax and indefinite: every expression was *maledictum*, and the subject, as well of a criminal as a civil proceeding, which was “*advrsus bonos mores civitatis*,” a vague and uncertain definition, as the mass of comment which it has undergone sufficiently evinces. A host of interpreters, according to Matthæus, have asserted, that to affirm, even truly, that a man had but one eye, or was bald, or lame, fell within the scope of this expression. Again: to say nothing of the difficulty of deciding what number of persons or what circumstances should constitute the *actus*, or what loudness of tone the *vociferation*, the very example adduced is sufficient to shew the laxity and extent of the definition, when even the demanding of a just debt before many witnesses was to be deemed to be a contumelious injury and offence. So convinced was the commentator just cited, of the difficulty of deriving any certain rule from the Digest on this subject, that he concludes with the expression of his opinion, that in each case it must be left to the discretion of the judge whether he will interfere or not. *Hanc ob causam ego existimaverim iudicis potius iudicio relinquendum esse ut ex re atque personâ statuât prætermittenda an animadvertenda hujusmodi sit contumelia.*

The law of England has recognized but one distinction as to the mode of communication, that is, between *mere oral* ones, and those effected by *writing*, printing, painting, or other visible signs. This distinction is, however, applied by the law of England in two instances of very great importance, the one in reference to civil the other in respect of criminal liability. In the first place, the circumstance of the calumny being conveyed in writing, print, &c. (in which case it is termed a libel) is made use of to constitute a very large and important class of substantive injuries, where the calumny is by legal definition and authority made actionable, though no actual damage can be shown. So that although, in other instances, the law limits such actions as are maintainable without special damage to particular and defined predicaments in reference to the nature and quality of the communication, and the probability that it will produce damage, though none can be expressly proved; as where it imputes the commission of a crime, or immediately affects the complainant, in his means of livelihood, yet in the particular instance of *written slander* the law abandons that principle, and by an arbitrary distinction, founded on the mere mode of communication, makes that to be actionable, without special damage, when it is written or printed, which would not have been deemed actionable had it been merely spoken. As for instance, to charge a man by word of mouth, with want of veracity, or with dissolute conduct, would not, unless some special loss were the consequence, support a claim to damages; yet if the same imputation were to be published in writing, the action for damages would be maintainable. This, however, must be regarded as an

[*lxx] *tion* *of the publisher ; first, either in the abstract, or secondly, taking into consideration the *occasion* and

absolute peremptory rule, not founded on any obvious reason or principle. If damage is to be presumed from publishing such a charge in writing, why is not some damage also to be presumed from publishing the fact orally ? The extent of publicity, and quantity of damage to be presumed in the one case, rather than the other is obviously casual and uncertain, and rather affects the measure and quantum of damages than any principle of civil liability.

Another, and that a most important application of this distinction between oral and written publications, is made by the law of England in the criminal branch of the subject. In all cases of mere personal calumny, the distinction between a written and an oral charge is made the material boundary between guilt and innocence. Whatever tends to lower and degrade a man's moral character in society, or to expose him to contempt and ridicule, is criminal, if it be published in writing, although the very same matter, if spoken only, would have constituted no offence. Here again the boundary is not founded on any intrinsic principle of criminal liability ; for one great object of the law in prohibiting the publication of libels of this description, is to exclude provocations which tend immediately to a breach of the peace, and it is obvious that oral abuse, when uttered in the presence of the party defamed and in the hearing of others, is oftentimes much more strongly provocative than the same calumny would be, though written, if published in his absence. But though such considerations clearly prove that the law of England, if the principles of intrinsic expediency were alone to be regarded, would be inconsistent in establishing a limit which would so frequently admit the very mischief to be guarded against, it is to be recollected that the expediency of a law in reference to the particular mischief intended to be excluded, is a very different question from its general expediency, in reference to extrinsic circumstances, which oftentimes greatly limit and restrain the generality of the rule which would prevail were the restraining of the particular mischief, the only object to be attained.

It is expedient, no doubt, to restrain men from using calumnious and provoking expressions concerning others, but it would, on the other hand, be highly inexpedient and mischievous to subject the utterer of every expression which might possibly provoke offence and retaliation, and ultimately violence, to a penal prosecution : it would be attended with fearful evils, legal as well as moral, if men's mouths were to be closed as to all communications in which the character or reputation of others might possibly be involved. What then is to be done if the evil cannot be wholly excluded, and cannot be tolerated without some restraints ; a line must somewhere be drawn, which, whilst it partially restrains, at the same time partially admits, the evil. In this, as in many other instances, good and evil are so closely and intimately blended, or rather perhaps, more properly speaking, opposite mischiefs so conflict and contend together, that it is impossible wholly to exclude either without increasing the whole quantity. In such cases the important problem is to discover the precise rule, which, though it does not entirely exclude either of the opposite and conflicting inconveniences, yet admits only the minimum of evil. It is upon these plain and simple grounds that the law of England is founded, which, whilst it prohibits the publication

**circumstances* of publishing? There are strong and [*lxxi] powerful reasons for insisting on the general proposition, *that if any man publish concerning another that which [*lxxii] in legal contemplation is injurious and actionable, no *limitation, exemption, or privilege, can be founded on the [*lxxiii] motive and intention of the publisher considered independently and abstractedly from some occasion defined and recognized by the law, and supplied by the circumstances. It is an obvious rule of natural justice, that wherever a man uses noxious and injurious means, he must be presumed to have contemplated and intended the injurious but natural consequence of using such means (i).

The publisher of a communication concerning another, which is in itself noxious and injurious, must stand in one or other of these different predicaments as to intention and motive. He may act either from a motive of pure malignity, as out of revenge for some supposed affront; or, secondly, from an honest and benevolent motive, as if a father were to warn a son that one with whom the latter was about to contract a partnership was insolvent, or a man of dishonest principles; or, thirdly, being merely *indifferent [*lxxiv] as to consequences, he may be actuated by some collateral motive, with a view to applause or gain, or may act carelessly and negligently, without any fixed or determinate motive whatsoever. As where one, for the sake of shewing his wit or talent for sarcasm, indulges it at the expense of another's reputation, not because he really feels any inclination to do that other an injury, nor because he is actuated by any personal feeling of hatred or animosity, but merely to entertain others and shew himself off to advantage.

But it is plain that no one of these predicaments can, without ref-

and punishes the publisher of written slander, takes no cognizance of mere oral calumny, and whilst it restrains by penal means all deliberate attempts to destroy character and reputation by written defamation, leaves mankind at full liberty to communicate on the subject of character and reputation, without the fear or apprehension of penal visitation.

(i) Si verba quædam prolata sint ambigua duplicem admittentia significationem, in bonam partem in dubio facienda eorum interpretatio, quoties enim alia potest capi conjectura pro delicto præsumendum non est. Sin tales fuerint prolati sermones qui per se et propriâ significatione contumeliam iferunt injuriandi animus adfuisse creditur.—Voet. Com. tit. de Injur. p. 1023.

erence to the legal occasion and circumstances of the act, afford any certain boundaries of responsibility. Be the motive ever so malicious, there may be and are cases where it is essential, on grounds of legal policy, to *exclude responsibility*. Again, though the intention of the party be ever so pure and unexceptionable, and consequently, though he be entitled to the utmost indulgence which is consistent with a due regard to the interests and characters of others, it may nevertheless be necessary to restrain the nature and mode of communication by such limits as may consist with general convenience ; for it is pretty obvious that a well intentioned man may use very exceptionable and very injurious means for carrying his intentions into effect ; and consequently, to make a mere abstract intention to do good, the criterion of civil, or even of criminal responsibility, would be a test far too uncertain and precarious for practical purposes ; it is essential, therefore, that the law itself should define, in reference to the occasion, to what extent the acting on such intentions should

be privileged. Where such boundaries have been defined [*lxxv] ed and *appointed by the law, the wilful transgression of them cannot be justified in foro conscientiae, still less in foro humano ; for no man has a right, even morally speaking, to act on his own opinion in derogation of the legal right of another, and in opposition to the municipal law of the country. To allow him to do so, because in his own opinion, his act was meritorious and expedient, would, in effect, be to permit every man to act on his own judgment, in opposition to the law, and that not only in the particular instance but in all cases, which, in effect, would be to substitute every man's own vague notion of what is right and expedient, for the certain rules established by the supreme power of the state.

It follows, therefore, that in the case of intellectual injuries to character and reputation, as well as in those of forcible ones to the person, it is for the law to define the particular occasion and circumstances which will operate by way of justification and excuse in cases where a wilful communication to the detriment of another would otherwise have subjected the author to make compensation in damages. And consequently it follows, that the real motive and intention of the author or publisher of a communication which is illegal, either intrinsically or in respect of its consequences, in the absence

of such an occasion and such circumstances as amount, in point of law to an absolute, or at least a qualified excuse, are wholly immaterial as a test of civil liability. And, consequently, that although the offence of calumny be defined in terms which include a corrupt or malicious intention, the *consilium* or *animus infamandi*, yet that in the absence of such an excuse for the publication of noxious matter, which the law recognizes, *such an inten- [*lxxvi] tion is necessarily to be inferred or presumed from the act itself (*j*).

(*j*) And, therefore, although according to the Roman law, the *mens rea* or *animus infamandi* was regarded to a much greater extent than the law of England permits; yet was the illegal intent regarded as a matter of inference from the use of contumelious expressions, *supra*, lxxiii. note (*i*).

It is not improbable that in the earlier stages of the law and before the limits of privileged communication had been defined by reference to the occasion and circumstances of the act, the *mere malicious intention* of the agent would be regarded as the principal test of civil responsibility. Experience would show the insufficiency of such a criterion, and limits would gradually be introduced, defined by reference to the occasion and circumstances of the act, independently of the actual intention with which the act was done. It is probable, however, that the former doctrine and language of the law, according to which malice is an essential to responsibility, would still be retained, but that effect would be given to the newly introduced limits, by recognizing the distinction between *malice in law*, which is nothing more than a mere legal inference resulting from the wilful doing of an unlawful act without legal excuse; and *malice in fact*, which depends on the actual intention.

And thus, in legal and technical language, malice would be regarded as essential to the action, and as the test of liability, although it was *actually* so in one class of cases only, that is, where the occasion supplied a qualified excuse or justification, dependent on the absence of actual malice; legal responsibility, in all other cases being dependent on the existence or non-existence of an occasion which supplied an absolute bar, and being wholly independent of the question of intention.

There is a distinction in the law of Scotland, as to *intention*, between cases where the damage is awarded merely in *solatium*, and where they are given to repair a *patrimonial loss*; that is, according to the law of England, between cases where the communication is intrinsically actionable and those where *actual damage* must be found; in the former case where the proceeding is *solatium*, it must be founded upon *dolus malus*; but in the case of *patrimonial loss*, *culpa levissima* is sufficient.—*Craig v. Hunter*, June 29, 1809.

Actual damages are due, though occasioned by an *error*.—per Ld. Gillies. *Borth*. 194.

The term “malice,” as used by the law of England, as essential to liability, includes the *culpa* as well as the *dolus* of the civil law.

4thly. The *occasion* and *circumstances* of the communication.

It is then to be considered, whether assuming noxious and injurious matter to have been published, the civil remedy ought to be restrained in respect of the occasion and circumstances of the act, either with or without reference to the *motive* and *intention* of the publisher.

In the first place, that it is on grounds of expediency, [*lxxvii] necessary, in numerous instances, to define and *restrain the right to damages by limitations, founded on the occasion and circumstances of the publication, admits of no doubt.

The necessity for such limitations is apparent, when it is considered, in the first place, that in numerous instances, a party, in making communications most injurious to character, is not a free agent, but necessarily acts under legal authority and compulsion. Thus, in every civilized state, such communications are necessary ; with a view to the administration of justice, and it requires no force of argument to show how seriously the course of justice would be impeded, if judges, jurors, and witnesses, who acted merely in obedience to the law, were to be subjected to the ordinary action for slander, in respect to the communications which they were obliged to make.

It is a matter of obvious policy and convenience, that [*lxxviii] great latitude should be afforded *in respect of such communications as are necessary for the ordinary exigencies of society, and the mischief and inconvenience would be great, if those were to be fettered and restrained by the perpetual apprehension of litigation.

If, then, the claim to damages ought, on grounds of extrinsic policy, to be limited by the occasion and circumstances, are these, and in what instances, to operate as an absolute and conclusive exception, independently of the question of intention ; and, again, in what instances are the occasion and circumstances to operate as a qualified bar, taking into consideration the *real motive and intention* of the author or publisher.

So essential, on grounds of policy and expediency, is it, that in some instances the occasion of publishing should constitute an absolute and peremptory bar to the total exclusion of civil liability, in respect of the publication of injurious matter, and that, in others,

the occasion should constitute not an absolute, but qualified bar, subject to the consideration of the actual intention of the publisher, that these general distinctions are probably common to every system of municipal law, subject, nevertheless, to particular modifications.

First, then, within what limits ought the particular occasion to operate as an *absolute bar*, independently of the motive and intention with which the communication was made.

It is observable, in the first place, that such an absolute and peremptory bar, with one exception, (that is, where the imputation is true,) seems to rest wholly on principles of external policy, for it is obvious, that in all cases, where one man, with a malicious and deliberate intention, *occasions damage to another by false and calumnious representations, he is bound to make compensation, both according to the plain principles of natural justice, and according to the ordinary maxims of municipal law, and, therefore, that any exemption from such responsibility must necessarily depend upon some external consideration of policy and convenience. In other words, that for some reason or other, less of mischief and inconvenience would result to society from denying a remedy in that class of cases, than on the other hand would accrue, if the ordinary remedy were accorded. This class of cases, therefore, does not admit of general, and, as it were, natural limits and boundaries, without reference to the state, condition and circumstances of the particular society, for whose governance the law is intended, and the general system and spirit of its institutions. It is easy, however, to see that, as a matter of extrinsic policy, such a protection ought to be extended principally in those instances, where the parties act under peremptory legal obligations, in the discharge of duties of so important and essential a nature, that it might be attended with great public inconvenience, to allow their motives to be called in question, and to subject them to ordinary actions of defamation. Such principles, applied to our own constitution and circumstances, would obviously include communications made in parliament, and, in all countries to those made by judges, jurors, and witnesses, in the ordinary course and administration of justice (*k*).

(*k*) The title of one section in Mr. Borthwick's Law of Libel in Scotland is "of

[*lxxx] *There is also one class of cases, where, although the
[*lxxxi] communication be in fact false, yet where it is *founded

privileged cases, where the capacity alone in which the defender has acted, may amount to a complete justification." And this absolute or peremptory privilege, which protects the party from an action for slander, without any regard to his motive or intention, applies to all communications by judges, jurors and witnesses, acting as such. The Lord Advocate is not liable to an action, in respect of any action which he institutes, however unfounded it may turn out to have been, yet he is compellable to disclose the name of his informer, who is liable to statutable penalties, as a false and calumnious accuser. Such a proceeding is closely analogous to the English action on the case for a malicious prosecution.

Mr. Borthwick states his opinion, that the law of England which considers the publication of the proceedings in parliament, or in the ordinary courts of justice, as absolutely privileged, is applicable to the Scotch practice, but with considerable abatement. And it appears that the practice which has prevailed in England, of publishing *ex parte* proceedings, even in criminal cases, has been frequently reprobated by the judges in Scotland. In the case of *Stewart v. Allan*, Dec. 31, 1818, Lord President Hope, in delivering his opinion, observed, "a newspaper, while it confines itself to the discussion of political affairs and public occurrences, is useful and worthy of encouragement, and the liberty of the press has been more important for the maintenance of our liberty than any one public right enjoyed by the people of this country. But what has the liberty of the press to do with the miserable lawsuits of individuals? And, in particular, I desire, from this chair to say, whatever may be the practice in England, what have newspapers to *do with lawsuits during their dependence*, or with prosecutions in criminal cases before they are concluded? It is the most mischievous and monstrous abuse of the liberty of the press, that I can imagine, to publish garbled statements of judicial proceedings, *which such accounts will generally be*, and thus to excite unfavourable impressions against one of the parties; I am astonished at what I see in the other end of the island—not only reports of *civil cases* published under such circumstances as may tend to prejudice the jury and the judge, but, to my amazement, you see precognitions taken, with a view to prepare for the trial of criminals, and which must have the effect of instilling prejudices into the minds of those who are afterwards to try their case. *Such practices are unknown here, and I hope they will always be so.*"

It seems, however, to be perfectly well settled, that, by the law of England, the publication of *ex parte* criminal proceedings will subject the publisher to criminal, as well as civil consequences, and the better opinion seems to be, that the same will extend also to the publication of mere *ex parte* civil proceedings of a defamatory nature. See the authorities, vol. 1, p. 257, and also Lord Hale's opinion, *St. Tr.* vol. 3, p. 543.

The constituting the occasion a peremptory bar to an action, without regard to malice, though the law of Scotland regards malice as of the essence of the offence, is reconciled by considering the criminal intention as rebutted or redargued by evidence of the occasion, which is thus made to operate as a *præsumptio juris & de jure*. This, it is obvious, is but a circuitous mode of saying, that in one class of cases, the question of malice is immaterial, and intention ceases to be a test of responsibility.

on reasonable and probable cause, the occasion may exempt from legal responsibility, notwithstanding the malicious and hostile motive of the accuser. The principle of immunity, in this case, is one of extrinsic policy, which affords protection to the party, though he commits a wrong, morally speaking, out of regard to the inconvenience which would result from discouraging men from making such communications. The principal instance of this class of cases is, that of a false and malicious prosecution. One who makes a criminal charge for the mere gratification of private malice, acts immorally, though there be probable ground for making it; and if no extrinsic consideration of policy intervened, there would be great reason for holding that such a charge should not be made but at the peril of the voluntary accuser, and that he ought, if he failed to substantiate his accusation, to make reparation to the party whom

*he had accused maliciously, and as it turned out, contrary to the truth. But a consideration of public policy [*lxxxii]

intervenes: it is for the interest of society that investigation should take place in all cases where there is reasonable and probable cause for inquiry, and therefore, the question arises, whether it would be productive of greater inconvenience to deny the individual remedy in such cases, that is, where a probable cause for preferring the charge existed, or to discourage prosecutions by allowing the remedy.

In the next place, still assuming that the complainant has sustained some injury from the publication of that which is in its own nature noxious and detrimental, the occasion of publishing may supply a *qualified* bar or defence to the action, dependent on the *real motive* and *intention* of the publisher.

This is a distinction, which, on considerations of natural justice, coupled with those of external policy, necessarily comprehends a numerous and important class of publications, affecting character and reputation. To prohibit communications, however necessary they might be in the ordinary intercourse of society, and however confidential in their nature, in all cases where they might occasion mischief to an individual, would be to impose restraints and fetters on mutual intercourse, which would, at the least, be inconvenient, if not intolerable. No one would be able to give a character of a servant, or even venture to give his opinion of an inn or tavern, for

fear of an action. And, on the other hand, to allow every individual maliciously to deal out malignant calumnies, under the cloak and color of privileged communications, would as little
 [*lxxxiii] consist with the convenience and comfort *of society, as with the principles of morality and natural justice.

The common and daily intercourse of mankind for the purposes of business, the ordinary exigencies of society, require that communications be made, though they may be prejudicial to particular individuals ; it would be vain and impolitic to endeavor to prohibit them.

But it is not for the convenience, but greatly to the prejudice of society, that false and injurious communications should be made, not in order to the furtherance of any good or beneficial object, but for the gratification of an evil and malicious disposition : here, then, is a plain and obvious limit to such communications. Where they are made honestly, and *bonâ fide*, with a view to the exigencies of society, they are privileged on principles of policy and convenience, though the party who made them was mistaken, but when they are *falsely* and *maliciously* made, they are not protected by any principle of convenience or utility, and therefore cease to be privileged.

The principle of qualified exemption, where the condition of immunity is integrity of intention, or, at least, the absence of actual malice, comprehends all cases where a communication is made *honestly*, with a view to the discharge of any legal, or even moral duty incident to a state of civilized society. Such communications, it is obvious, ought to be protected, whenever they are made sincerely, and not with an actual and malicious intention to defame.

This principle, therefore, includes all cases where the
 [*lxxxiv] communication is made in confidence to another *on a subject in which he possesses an interest. As where a party gives a character of a servant, or makes the communication in the way of admonition or advice, or in the fair and *bonâ fide* furtherance of the interests of others, or even of his own. In respect, therefore, of this class of cases, that is where an occasion exists, which, if fairly acted upon, furnishes a legal, protection to the party who makes the communication, the *actual intention* of the party affords a boundary of legal liability ; if he had that legitimate object in

view, which the occasion supplies, he is neither civilly nor criminally amenable; if on the contrary, he used the occasion as a cloak of maliciousness, it can afford him no protection (1).

*And here it is to be observed, that as the honesty and [*lxxxv] integrity with which a communication of hurtful tendency is made, cannot exempt from civil liability, unless it be coupled with an occasion recognised by the law, so, on the other hand, responsibility ought immediately to attach, where the mode or nature of the communication in any respect exceeds that which the legal occasion warrants. For as to the excess, no legal justification or excuse arises from the occasion, and the case stands on the same footing, as far as regards such excess, with any other communication made without lawful excuse; that is, the mere absence of express malice, cannot justly repel the action. And, therefore, though A., knowing that B. was about to employ an agent, whom he, A., suspected to be a man of unprincipled character, would be justified in

(1) With respect to this extensive class of cases, the laws of England and of Scotland, proceed on the general principles stated in the text, and *malice in fact*, is the test of civil and criminal liability. According to the doctrine of the Scotch courts, the occasions operates as a *presumptio juris* or as *prima facie* evidence of the absence of a malicious intention to injure, and proof of the contrary is thrown on the pursuer. See Borthw. L. L. 213. And according to the law of England, *infra*, vol. 1, p. 292, there are numerous cases of privilege, where proof of actual malice is essential to support the action. The extent to which the privilege is allowed to operate, seems to be the same in Scotland, and is illustrated by Mr. Borthwick, in its application to cases of characters given to servants, of speeches by advocates, of literary criticism, and in general of any communication made either by or to one who has an interest in the making it. The following instance may be cited by way of illustration:—A person who was in the habit of sending his grain to a mill to be made into meal, had discovered a contrivance, by which the miller abstracted a part of all the grain brought to his mill. He immediately communicated his discovery to all those who tholed at the mill, and also to all those who voluntarily employed it. Upon an action being brought by the miller, before the sheriff of the county, the judge deemed the case to be a privileged one, the communication having been made by a person who had sustained an injury, to others who had been also injured by the pursuer's dishonest conduct, and who had therefore an interest to be made acquainted with it. The defender offered to prove the truth of the information, which the sheriff allowed. The miller denied the fact, but he argued that, at any rate, the defender had no privilege or title to take the method he had done to check the evil, and, on that ground, ought not to be allowed to show the *veritas convicii* and to this effect he brought the proof before the court of session, by a bill of advocacy, which their lordships refused. Borth. L. L. 236.

communicating his knowledge to B., although he was in fact mistaken, yet he would not be justified in doing so in the hearing of other persons who were not interested in the fact ; for the occasion warrants a communication to B. only, and as to the rest, it is mere excess, not warranted by the occasion ; and though A. [*lxxxvi] might really be influenced by the honest *motive of warning B. of the danger he would incur in employing such an agent, yet he acted illegally in depriving the latter of his character unnecessarily, and upon *suspicion only*. If, indeed, he knew, and could prove the truth of his communication, he might well justify a publication to all the world ; but that is a defence which stands upon an entirely different foundation.

If A. really suspected that the agent was a dishonest man, the law, founded on the principles just announced, would protect him in making the communication *bonâ fide* to B., though in truth he was mistaken ; the honesty of his design, superadded to a legal occasion, would constitute a full defence ; but when he makes the communication to *others*, the occasion, as far as concerns the communication to them fails, and he ought, on the plainest principles of natural justice, to be responsible for a wilful and wanton derogation from the right of another, by *unnecessarily* making a charge which turns out to be *false*.

Having thus briefly noticed the principal circumstances which seem to be essential to the limitation of freedom of communication, for the sake of security of character to individuals, and the natural boundaries which appertain to such limitations, the subject is now to be considered in reference to the welfare and security of *the public* (m)

(m) It is remarkable that, by the law of Scotland, four different objects may be combined in a proceeding for libel.—1. For a reparation for damages sustained in property.—2. A *solatium* commensurate to the plaintiff's *mental* and personal sufferings.—3. For penal censures, *ad vindictam publicam*.—4. For a palinode. See Borth 34. By the civil law, though the ground of the remedial and criminal proceeding, in case of libel, was identical, yet the actions were kept distinct.

According to the law of England, an entire distinction is preserved between civil and criminal proceedings in cases of libel, except, perhaps, in the single instance of an action of *scandalum magnatum*, under the statutes, vide vol. 1. p. 175

The law of England, formerly, combined criminal and civil proceedings to a far

*Here, pursuing the same course as before, the ques- [*lxxxvii]
tions are, 1st, whether restraint be necessary for the se-
curing the interests of the public? 2ndly, What are the proper
modes and limits of restraint?

In the first place, the necessity for some degree of restraint is
of too obvious a nature to require more than a few cursory remarks.
It is plainly essential that the laws of every civil society should
provide not only against attempts to produce a violent and prema-
ture dissolution of its existence, but also against indirect as well as
direct endeavors to violate its particular regulations and ordinances,
and bring them into contempt.

To a perfect system of jurisprudence, no laws can be more es-
sential and important than those which protect the very existence
and safety of the civil constitution itself. It would be in vain to erect
the political edifice, without at the same time securing its founda-
tions.

*Where the immediate end and object of communica- [*lxxxviii]
tions whether oral or written, is the total subversion of
the civil constitution, they necessarily rank, in degree, with other
treasonable practices against the state.

Where they amount to direct incitements, to commit some specific
violation of a particular law, the offence must necessarily be nearly
of kin to an actual violation of that law; if an actual breach of
the law be the consequence of such a solicitation or incitement, the
act amounts to an absolute and complete transgression of the law,
and even though that consequence should not follow, yet a deliber-
ate attempt to break the law must necessarily constitute an offence
which, in principle at least, calls for penal visitation.

And the necessity for restraint applies to indirect, as well as di-
rect solicitations, to violate the law; for, as the latter may be

greater extent. In an action for the abduction of a wife, the offender even now is
not only liable to damages to the injured husband, but also under the same statute,
(1st of West.) to two years' imprisonment. And the form of proceeding in a civil
action of trespass, *vi et armis*, to this day, shows that the guilty defendant was also
liable to pay a fine to the king, for his breach of the public peace. Such considera-
tions are not merely of a formal and technical nature; the tendency of such combi-
nations is to annex incidents in common, which ought, for convenience sake, to be
annexed separately.

equally efficacious, they are equally dangerous with the former, and ought, therefore, to be equally prohibited. But farther, it is obvious that the security of a state may be endangered, not only by direct and immediate attempts to subvert it, but even still more successfully, by bringing its establishments, civil and religious, or its ministers and officers, into disgrace and contempt; that the state and reputation of individuals are as much or more exposed than even their persons or property to malicious and insidious spoliation, and that men may be excited and provoked to commit acts of violence by collateral insults, as well as by the most open and direct solicitations. It is, therefore, essential to the security of every civil government, as well as to the preservation of its [*lxxxix] establishments, the due observance of its laws *and ordinances, and protection of its members, that restraint should be imposed, as well upon indirect as direct attempts of this nature.

There are other evils equally serious, against which security is necessary. Mere positive laws are of little avail, without the powerful aid of religion and morality; it is therefore of great importance, to the well-being of society, that its interests should be protected against the pernicious influence of communications tending generally to extinguish men's religious faith, and to eradicate from their minds the principles of morality.

For though human laws which ought to be definite and precise, which must be of limited extent, and which command not but where they can compel, cannot be co-extensive with the obligations of morality; and although by far the greater part of the ordinary duties of a member of society, fall not within the scope of any positive municipal laws, but must be left to every man's sense of propriety and conscience, and to a salutary dread of public censure, the same difficulties do not apply in restraining generally, by positive laws, such communications as tend to instil bad principles or extirpate good ones, and which, consequently, tend not only to the disregard and neglect of all the moral, as well as legal duties of life, but to the active practice of every species of immorality. To restrain such attempts is the more necessary, when it is considered, that for the performance of most of the common duties of life, undefined by positive law, and for

the preservation of decency and good order, religious and moral principles and the dread of public censure, are the only securities.

*Such considerations become infinitely more strong and [*xc] important, when they are considered in reference to the facility of communication, supplied by the art of printing, especially where its operation is still further extended by a general system of national education, which, in effect, subjects to its power the great mass of the public.

The press is, indeed, a mighty instrument for the diffusion of knowledge, capable of being applied to the best, or perverted to the worst of purposes ; eminently useful in promoting the interests of religion, morality, science, and social happiness, it may be abused as the instrument of impiety, vice, error, and malice. When, therefore, it is considered how much, not merely the opinions, but the feelings and passions of the public, are capable of being influenced and excited by means of this powerful agent, how few there are who think for themselves, and who are not, it may be insensibly, guided and moved by the opinions of others, how great a dominion may be exercised by one strong mind over those of millions, how favourable the generality of mankind are to the reception of the most calumnious charges ; how credulous in listening to the most improbable misrepresentations ; and how greatly every calumny, directed against an individual, is aggravated by increased publicity ; when these things are considered, it will readily appear, of what supreme importance it must be in every system of municipal law, on the one hand to protect the liberty of communication, and on the other to exclude the complicated and frightful mischiefs which must necessarily emanate from a corrupted, venal, and licentious press.

*What, then, are the proper mode and measure of restraint ? [*xci] Public security must be provided for, either by imposing *previous restraints*, or admitting the general right to publish, by subjecting those who abuse the privilege to *subsequent punishment*.

And such *previous restraints* are either absolute or qualified.

The notion of *absolute* exclusion is too extravagant to require attention ; it is a scheme calculated only for extreme cases ; that is,

either for a state of complete despotism, where the condition of the people cannot be worse, and where it is the policy of the oppressors to prevent its becoming better, or for a state of absolute, but alas, ideal perfection, where, *ex hypothesi*, every alteration must be for the worse, and where to change and to repent are convertible expressions (*n*).

What shall we say, then, of that kind of modified intellectual dominion, which not only may be, but has been exercised, even under a constitution in other respects free (*o*), that is by subjecting the press to the control of a public licenser.

[*xcii] *At this day, and in this country, where the liberty of the press has so long been beneficially enjoyed, though

(*n*) It is scarcely necessary to remind the reader, that Sir Thomas More, in his *Utopia*, makes the discussion of political affairs punishable with death.

(*o*) M. Delolme, in his *Essay on the Constitution of England*, observes, "This privilege (of our press) is that which has been obtained by the English nation with the greatest difficulty, and latest in point of time, at the expense of the executive power. Freedom was, in every other respect, already established, when the English were still, with regard to the public expression of their sentiments, under restraints that may be called despotic. History abounds with instances of the severity of the court of Star-Chamber, against those who presumed to write on political subjects. It had fixed the number of printers and printing presses, and appointed a licenser, without whose approbation no book could be published. Besides, as this tribunal decided matters by its own single authority, without the intervention of a jury, it was always ready to find those persons guilty whom the court was pleased to look upon as such; nor was it, indeed, without ground, that the Chief Justice Coke, whose notions of liberty were somewhat tainted with the prejudices of the times in which he lived, concluded his eulogiums on this court, with saying, 'The right institution and orders thereof being observed, it doth keep all England in quiet.'"

After the Court of Star-Chamber had been abolished, the Long Parliament, whose conduct and assumed power were little better qualified to bear a scrutiny, revived the regulations against the freedom of the press. Charles the Second, and after him, James the Second, procured further renewals of them. These latter acts having expired in the year 1692, were at this era, although posterior to the revolution, continued for two years longer, so that it was not till the year 1694, that in consequence of the parliament refusing to prolong the prohibitions, the freedom of the press was finally established.

The principle of restriction, by the discretion of a public licenser, still exists, in a very limited degree, in the instance of dramatic representations. By the st. 10 G. 2. c. 28, no dramatic composition can be represented on any public stage, without the previous license of the Lord Chamberlain. And by some particular statutes, regulations are made to facilitate proceedings, civil as well as criminal, against the publishers of newspapers and certain pamphlets. See *Treatise*, vol. ii. p. 43—313.

not without both great and frequent abuse, little need be observed on the subject of censorial restraint.

Upon the question, whether such a mode of restraint would be expedient, that is, whether it would exclude more of evil than it introduced, it is very material to recollect, in the first place, that the comparison *is not between the evils occasioned [*xciii] by such restraint on the one side, with those which would result from a *total* absence of restraint on the other, but merely with the excess of such evils, beyond the amount to which they may be corrected in the ordinary course of justice; that is, by inflicting penal visitation on those who, being allowed to publish without previous impediment, abuse that license, by publishing what is noxious and illegal. For it cannot be doubted, that it would be attended with a less degree of inconvenience, and would interfere far less with the natural liberty of the subject, to inflict penal censures on those who abused the right of free communication, than to extinguish the right, by subjecting every publication to the summary control of a licenser.

To impose a general interdict on society, rather than restrain an evil by the punishment of a few, and those, such as had actually offended; to deprive all of the exercise of a valuable privilege, because some would abuse it, would truly be to sacrifice the wheat for the sake of rooting up the tares; it would be to exclude all that was good, because it was mixed with partial evil, a principle which, were it applied on all occasions where mischief were to be prevented, would speedily exclude every thing that was good and valuable. What privilege do we boast, what blessing do we enjoy, which is not greatly, and even frequently abused?

If then the evil to society from an abuse of the liberty of free communication, or as it is usually termed, the liberty of the press, could be sufficiently corrected and restrained, by punishing such as really offended without any surrender or sacrifice of the general right *to publish, there would be an end of the [*xciv] question, and the subjecting the press to the control and dominion of a licenser, would be an unnecessary sacrifice of a most valuable portion of the liberty of the subject. But, again, were it even to be admitted, that penal inflictions constituted a restraint in-

adequate to the correction of the press—which, so long as those infictions may be indefinitely extended, according to the magnitude and frequency of offences and the exigencies of the times, it is difficult to suppose—yet still as it must, on the other hand, be allowed, that such penal restraints must check and correct the mischief which would otherwise result to society, to a very great extent, it is obvious, that it is only the excess of mischief, which cannot be so corrected, that ought fairly to be weighed against the evils which would arise from the establishment of a public licenser.

In general, civil liberty has been well defined to consist in the not being restrained by any law which does not conduce, in a *greater degree*, to the public good (*p*).

[*xcv] *Until, therefore, it were shown that the liberty of free and unreserved intellectual communication, on all subjects of common interest, ought, for the public good, to be surrendered to the exercise of an authority and dominion arbitrary and irresponsible, the contrary ought to be inferred, it would argue a strange degree of apathy, even folly, to sacrifice so valuable a portion of natural liberty, without the fullest conviction that at the least an equivalent was received in return, and the burthen of proof would clearly be incumbent on those who advocated such a surrender. How difficult must such proof be, when experience, the best and safest guide, bears testimony to the inexpediency of such a sacrifice (*q*).

(*p*) In what, then, does the liberty of the press precisely consist? Is it liberty left to every one to publish any thing that comes into his head; to calumniate, to blacken whomsoever he pleases? No; the same laws that protect the person and property of individuals, do also protect his reputation: and they decree against libels, when really so, punishments of much the same kind as are established in other countries. But, on the other hand, they do not allow, as in other states, that a man shall be deemed guilty of a crime for merely publishing something in print, and they appoint a punishment only against him who has printed things that are in their nature criminal, and who is declared to be guilty of being so by twelve of his equals appointed to determine on his case.—Delolme.

Those laws are the most favourable to liberty which define that which is criminal, and, consequently, make liberty the general rule, and a penal restraint the exception. M. Delolme who had conceived high notions concerning the liberties of Englishmen, had supposed that every action was secured by positive laws carefully worded, and was at last surprised to find that the liberty of the press was founded simply upon the absence of prohibition.

(*q*) A very popular ethical writer has thus expressed himself upon this subject.

*One of the most obvious evils which would result [*xcvi]
 from previous restraint on the liberty of the press, *un- [*xcvii]
 der a constitution where the people were possessed of

"If nothing may be published but what civil authority shall have previously approved, power must always be the standard of truth : if every dreamer of innovation may propagate his projects, there can be no settlement : if every murmurer at government may diffuse discontent, there can be no peace : and if every sceptic in theology may teach his follies, there can be no religion. The remedy against these evils is to punish the authors, for it is yet allowed, that every society may punish, though not prevent, the publication of opinions which that society shall think pernicious : but this punishment, though it may crush the author, promotes the book ; and it seems not more reasonable to leave the right of printing unrestrained, because writers may be afterwards censured, than it would be to sleep with doors unbolted, because by our laws we can hang a thief."

The most satisfactory refutation which can possibly be given to a theoretical suggestion of danger, is that which experience supplies : the press in this country has, for considerably more than a century, been rescued from the control of a licenser ; yet peace, tranquillity, and religion still survive amongst us.

But, surely, with all respect to the memory of one who was justly accounted a giant in his day, it is but weak and timid policy to surrender a privilege estimable and valuable in its own nature, because it may be perverted and abused. If men are to be prohibited from public communication by writing or printing, if the pen and press are for this reason to be placed under arbitrary restraints, why should even the tongue be privileged ? Why should any man be allowed to speak in public, when it is possible that he may utter sedition or blasphemy ? Why allow books to be printed at all ; for the very arbiters of religion, politics, morals and taste may as well as others, be subject to error or even corruption ; and what would the state of society be, when not only were vicious and corrupt publications sent forth under the sanction and impress of public authority, but all that was really edifying and instructive was wickedly suppressed. The liberty of the press and rational freedom of public discussion are the real bolts and bars by which alone depredators on the religious and political rights of society are to be shut out, and the interest of the community preserved. To destroy these would, in a political sense, most surely be to sleep with doors unbolted, without even the poor consolation of being able to hang the thief.

When the art of printing was discovered, it was justly apprehended that it would prove an instrument of mighty force in its operation on public opinion in all matters of great and common interest. But though many generations have now elapsed since the date of this noble invention, its operation was necessarily restrained and limited, whilst the great mass of the people, consisting of those who were most likely to be influenced by its means, were unable to read ; it was reserved for later times to give an impetus to its powers, by extending the means of knowledge to the lowest classes, and opening to a portion of society, far exceeding the rest in numbers and physical strength, the sources of knowledge, and thus affording them the means of judging, and, what is of greater importance in a political point of view, of

influence, would be the destroying, or at least weakening, the mutual confidence which ought to subsist between the people and the government, and which is essential to a vigorous administration of public affairs.

Under such a constitution, public confidence must rest on public opinion, and public opinion cannot be manifested, or even exist, unless the measures of government be known, and be subject to free discussion and comment (*r*).

[*xcviii] *Such a government, from which public confidence and public support are withdrawn, must necessarily be timid and indecisive in all measures of importance ; the responsibility of those who conduct public affairs, is greatly increased in pursuing a course of which the body of the people disapproves, whilst their means of accomplishing objects of magnitude and difficulty are nec-

acting for themselves. It is to this important change in circumstances and education, as well as to the great increase of wealth and population in this country, that the multiplication of newspapers, the principal vehicles for the communication of public measures and events, and of the various opinions and comments to which they give rise is to be attributed.

Whether it were wise or politic to encourage so great a change, belongs not to the present occasion to consider. That no evil consequences have as yet resulted, which can be at all placed in competition with the splendid advantages of an open and free press, or to induce the most timid to regret its emancipation, seems to be most certain. It is only from the licentious abuse of our liberty that danger is to be apprehended ; and those are justly to be regarded as the greatest enemies to freedom, who by their perversion of the blessing, endeavour to render it a curse, and who endanger the liberties of all by abusing the most valuable of their own, for unworthy, base, and venal purposes.

The transition is by no means difficult or improbable from a licentious abuse of liberty to severe and excessive restraint ; in such respects, the danger always is of running into extremes ; to escape one pressing evil, mankind are too apt too seek an insecure refuge in its opposite.

(*r*) M. Delolme, in his *Treatise on the Constitution of England*, (p. 292. ed. 1816) observes, on this subject, “ we may therefore look upon it as a further proof of the soundness of the principles on which the English constitution is founded, that it has allotted to the people themselves the province of openly canvassing and arraigning the conduct of those who are invested with any branch of public authority, and that it has thus delivered into the hands of the people at large, the exercise of the censorial power. Every subject in England has not only a right to present petitions to the king or the houses of parliament, but he has a right to lay his complaints and observations before the public by means of an open press.

essarily diminished, and that energy and spirit to which public approbation and applause are essential, are weakened and impaired.

Nor is public confidence in the administration of affairs, more essential to internal safety, than it is to security from abroad. It were absurd to suppose that a government could command respect abroad, which was hated or despised at home. Such a condition of things must necessarily engender among foreigners an opinion of internal weakness, and for a nation to be weak, or even to be accounted so, is to be contemptible and insecure.

The advantage of free and unrestricted communication, on all political subjects, is great and reciprocal; if the people have thus an opportunity of forming and expressing their opinion on public measures, those who administer affairs have also the means afforded them of becoming acquainted with the disposition, sentiments, and wishes of the people, of availing themselves of beneficial and useful suggestions, of affording explanation *and redress [*xcix] where complaints are well founded; in short, of securing that esteem, respect, and confidence on the part of the people which are essential to an useful and vigorous administration (s).

The liberty of political discussion is valuable, inasmuch as it tends to preserve stability in the political constitution, enables the people to exert a salutary influence, and prevents violent and sudden changes (t). *These, however, are positions [*c] which must be carefully limited to those cases where the

(s) *Nec vero negligenda est fama nec mediocriter telum ad res gerendas existimare oportet benevolentiam civium. Cic. de Amic. 502.* Though some make slight of libels, yet you may see by them (observes Selden,) how the wind sits. As, take a straw, and throw it up into the air, you shall see by that which way the wind sets, which you shall not do by casting up a stone; more solid things do not show the complexion of the times so well as ballads and libels.—Selden's Table Talk.

(t) The liberty of the press, which consists in the liberty which every subject possesses of publishing what he will, without previous restraint, subject, however, to penal censures if he publish what is malicious and illegal, constitutes the great excellence of the British constitution. On this subject we may trust to the evidence of learned foreigners, without fear lest the judgment should be warped and biased by native prejudices. M. Cottu, a learned advocate of Paris, after having devoted much personal attention to the laws and constitution of this country thus expresses himself: "The liberty possessed by all classes of the nation, of acquainting government legally, and without recurring to mobs and insurrections, with their private opin-

constitution is constructed on a fair and equitable basis, that is, where no larger a portion of natural liberty has been surrendered for the common good than is necessary for that end, or at all events, where there is no great and striking disproportion between the benefit received and the price paid for it; in all other cases this species of liberty would tend to produce political changes and alterations rather than stability. Under a rigid democracy, or any other kind

of government where the people, highly tenacious of natural liberty, contributed too small a portion of it ^{to} render sufficiently strong and effective, it is natural that demagogues, ambitious of popular influence, should abuse their unsundered excess of power to exalt each his own individual authority; in such a case, it is obvious, that unrestrained freedom of political discussion would be very ineffectual towards securing peace or per-

ion on all the measures of administration, forms the main perfection of the English constitution."—Cottu, 194, (English Translation.)

And again,

"Whenever any important subject is submitted to the discussion of parliament, the king and the two houses have the advantage of seeing clearly the nation's opinion on the proposed measure, and ascertaining how far it should be pressed or abandoned; and it is thus that the strength of the people, which, united in one single mass, would form a torrent, whose accumulated waves might, at the first obstacle, overwhelm the government, is divided, on the contrary, into an infinite number of individual bodies, resembling a number of peaceful brooks, which adorn and fertilize the plains they water, without the power of ever doing mischief."—Ib. 196.

On such subjects, the treasures of history contribute less of information than on any other subject of public interest and policy. Were the laws of ancient nations more comprehensive and complete than we find them to be, a total change in those essential circumstances to which the restrictive laws are adapted, would require a corresponding alteration in the laws themselves. The ordinances by which a great nation composed of subjects jealous of their freedom, amongst whom political knowledge is daily diffused by means of the press, who take a lively interest in all public measures, and who possess the means of expressing their opinion on such subjects, can afford but few points of comparison with any former age or country. When the art of printing was yet unknown, the great mass of the people, destitute of information, could seldom be moved, but on great and sudden occasions, to make any important political exertion, and then only by fits and starts, according to the operation of violent and transitory causes. How much happier are the times when force and violence give way to reason, when the strong and speedy expression of public opinion often produces greater results than could formerly have been obtained by a sanguinary appeal to arms.

maney in public affairs. In such instances, even fair comment would but betray to the thinking and rational, the weakness, inefficiency, and instability of their political system, and induce them to wish for change, whilst party zeal, instead of attributing the mischief to its true cause, the want of a supreme power, possessing reputation, confidence, and *strength*, sufficient to secure the public peace from repeated aggressions by turbulent factions, would but foment successive struggles for popular ascendancy by mutual and intemperate recriminations, at the expense of a constant diminution of public strength and security.

On the other hand, under an arbitrary and despotic form of government, where the people had surrendered too large a portion of their liberties, discussions tending to show the inexpediency of their political condition, would necessarily tend also to render the people discontented, dissatisfied, and anxious for change, whilst it would be the interest of those who thus possessed an excess of power beyond what was just, to prevent and hinder such communications, in order to oppose that tendency. And it is obvious, that in proportion to the degree of oppression under which the people laboured, the stronger would be the motive with those in power to suppress the discussion of public measures and silence remonstrances, for the greater would be the *probability of change, either [*cii] reluctantly yielded to the influence of public opinion, or compelled by an appeal to force. And thus it is that, under a state of absolute despotism, where a successful tyranny has reduced the people to the ultimum in servitude, it becomes a necessary incident to the same wicked policy to compel men, not to forget their wrongs, for memory must remain to the most abject, but to suffer them in silence (*u*).

(*u*) Dedimus profecto grande patientiæ documentum et sicut vetus ætas vidit quid ultimum in libertate esset, ita nos quid in servitute, adempto per inquisitiones et loquendi audiendique commercio. Memoriam quoque ipsam cum voce perdissemus si tam in nostrâ potestate esset oblivisci quam tacere. Nunc demum redit animus, &c. Such were the affecting observations of Tacitus, in describing the happy transition to the government of Trajan from a state of abject suffering under the rod of Domitian.

The Emperors Julius and Augustus had the magnanimity to despise, or at least the prudence to overlook, many instances of personal calumny against themselves.

[*ciii] *It is only under a just and equitable constitution that freedom of discussion tends to the desirable ends of peace, permanency, and security. Where a reasonable and fair proportion exists between the quantum of liberty which is surrendered, and the advantages derived from a free constitution and equal laws, the people are little, at all events they are much less likely, to be influenced by the desire of change; and the more they know and discuss the nature of their political system, the greater must be their attachment to the existing state of things, whilst the notoriety of all public measures, the privilege of free discussion, of openly expressing public opinion, and the de-

Antonii epistolæ, Bruti conciones, falsa quidem in Augustum probra sed multâ cum acerbitate habent. Carmina Bibaculi et Catulli referta contumeliis Cæsarum leguntur. Sed ipse Divus Julius ipse Divus Augustus et tulere ista et relinquere; haud facile dixerim moderatione magis an sapientiâ; namque spreta exolescunt, si irascere adgnita videntur; non attingo Græcos quorum non modo libertas etiam libido impunita, aut si quis advertit dicta dictis ultus est.

These were the observations attributed to Cremutius Cordus, who was accused under the gloomy reign of Tiberius, with having extolled Brutus and Cassius, and asserted that Cassius was the last of the Romans. *Postulatur*, says the historian, *novo ac tunc primum audito crimine quod editis annalibus laudatoque, M. Bruto C. Cassium Romanorum ultimum dixisset. Accusabant Satrius Secundus et Pinarius Natta, Sejani Clientes; id perniciosum reo et Cæsar truci vultu defensionem accipiens.* So little hope had the unfortunate orator of experiencing clemency or even justice, that, after making his defence before the senate, he sought death in abstinence. One of the most bitter reflections on the memory of Tiberius, as a ruler, is the record of the historian, that a solitary act of clemency to a libeller diffused a transitory feeling of satisfaction (*modica lætitia*) over a desponding people.

Illi tamen adsiduis tamque mœstis modica lætitia interjocitur quod C. Cominium Equitem Romanum probrosi in se carminis convictum Cæsar precibus fratris que senator erat concussit. Tac. *Annal.* 1. 4.

According to M. Montesquieu, "no government is so averse to satirical writings as the aristocratical. There the magistrates are petty sovereigns, but not great enough to despise affronts. If in a monarchy a satirical stroke is designed against the prince, he is placed on such an eminence, that it does not reach him, but an aristocratical lord is pierced to the very heart. Hence the decemvirs, who formed an aristocracy, punished satirical writings with death." B. 12, c. 13.

It may, for reasons hereafter given, be doubted, whether the decemviral law was so severe as M. Montesquieu supposes; there is at least no proof that so cruel a law was ever enforced to its extent. On the other hand, Augustus and Tiberius first violated the law by a tyrannical construction, which brought satirists within the penalties of treason, and subjected them to capital punishment.

gree of influence which that opinion *must necessarily possess (*v*), tend to inspire the people with confidence in their rulers, and diminish the probability of popular disaffection and civil commotion.

On the other hand, the same considerations render any encroachment upon the liberties of the people, if not impracticable at least difficult. It would be impossible that any formidable practices against their interests could long be carried on in secret (*w*), and to *make them known, to expose their authors, [*civ] and subject them to the strong expression of public indignation, would be to defeat their purpose; at all events, would

(*v*) M. Delolme, in his *Essay on the British Constitution*, after commenting on the effect of laws which allow to the people full scope for the expression of their sentiments, concludes his observations with the following remarks:—

“In short, whoever considers what it is that constitutes the moving principle of what we call great affairs, and the invincible sensibility of man to the opinion of his fellow-creatures, will not hesitate to affirm, that if it were possible for the liberty of the press to exist in a despotic government, and (what is not less difficult) for it to exist without changing the constitution, this liberty would alone form a counterpoise to the power of the prince. If, for example, in an empire of the east, a place could be found, which, rendered respectable by the ancient religion of the people, might ensure safety to those who should bring thither their observations of any kind, and from this sanctuary printed papers should issue, which, under a certain seal, might be equally respected, and in which, their daily appearance, should examine and freely discuss the conduct of the cadis, the pashas, the viziers, the divan, and the sultan himself, that would immediately produce some degree of liberty.”—*Delolme on the Constitution of England*, 303, ed. 1816. Again, the same learned foreigner observes, p. 304, “another effect, and a very considerable one, of the liberty of the press, is, that it enables the people effectually to exert those means which the constitution has bestowed upon them, of influencing the motions of the government.”

(*w*) “Private individuals, unknown to each other, are forced to bear in silence injuries in which they do not see other people take a concern. Left to their own individual strength, they tremble before the formidable and ever-ready power of those who govern, and as the latter well know, and are even apt to over-rate the advantages of their own situation, they think that they may venture upon any thing. But when they see that all their actions are exposed to public view, that in consequence of the celerity with which all things become communicated, the whole nation forms, as it were, one continued irritable body, no part of which can be touched without exciting an universal tremor, they become sensible that the cause of one individual is the cause of all, and that to attack the least among the people, is to attack the whole people.”—*Delolme on the Constitution of England*, p. 318. ed. 1816.

give great facility to resistance, and in proportion, render any such attempt more difficult and dangerous, and ultimate success the more improbable (x).

[*cvi] *The influence which the subjection of the press to the control of a licenser must necessarily have on the spirit and manners of a free nation, is not to be disregarded, on account of its more immediate and important political consequences. What could more directly tend to lower and subdue the spirit of a free people, and to render them unfit for the enjoyment and maintenance of their rights, than to subject their minds to a state of intellectual thralldom? What more effectually restrain and fetter the exertions of genius and of talent, than the melancholy consciousness that their happiest efforts might be rendered fruitless and abortive; that the avenues to fame, honour and preferment, might be closed against them by the caprice, the ignorance, or it may be the malice of a despotic arbiter, irresponsible, and from whose tribunal there was no appeal. Were ages to be spent in the attempt, no other scheme or device could possibly be discovered so admirably calculated as this, to retard the progress of science and of letters, to hinder all improvement in religion, in politics, or morals, to enervate the public mind and prepare it for every species of degradation.

Finally, the very exercising of such a control would necessarily

(x) With regard to those who, whether from personal privileges, or by virtue of commission from the people, are intrusted with the higher part of government, as they, in the mean time, see themselves exposed to public view, and observed, as from a distance, by men free from the spirit of party, and who place in them but a conditional trust, they are afraid of exciting a commotion, which, though it might not prove the destruction of all power, yet would surely prove and immediately be the destruction of their own. And if we might suppose, that through an extraordinary conjunction of circumstances, they should resolve among themselves, upon the sacrifices of those laws on which public liberty is founded, they would no sooner lift up their eyes towards that extensive assembly which views them with a watchful attention, than they would find their public virtue return, and would make haste so resume that plan of conduct, out of the limits of which they can expect nothing but ruin and perdition.

The power of the people is not when they strike, but when they keep in awe; it is when they can overthrow every thing that they never need move; and Manlius included all in four words, when he said to the people of Rome—*Ostendite Bellum pacem habebitis* Delolme on the Constitution of England, p. 321. ed. of 1816.

add greatly to the responsibility of those who administered the affairs of state ; for professing to reject all that was injurious, they must be taken to approve and sanction all that they allowed to be published.

It remains to make one or two observations on the abuse of this invaluable privilege. If at any time the public press should have become generally venal, corrupt and licentious, should teem with profligate and *immoral publications, with artful [*cvii] and studied misrepresentations, with wanton calumnies on the characters of the well-deserving, or what is equally offensive with venal and fulsome panegyric upon knaves, the necessary conclusion would be, that the very condition of society was tainted and unsound. To say that the press is corrupt is but a figurative expression ; it means, in reality, that one set of men publishes, whilst the rest of society reads, approves of, and encourages vicious productions.

But if such should be the disposition, or, at all events, the apathy of the public, in regard of the morals of the press, as to encourage or tolerate its ministers in committing licentious violations of truth and decency, it is manifest, not only that the temptation would always be sufficient to censure a constant supply, at all risks, of scandalous and illegal matter, but that all attempts to earn public favour by honest means would be vain and fruitless.

The public in fact are, or ought to be, the arbiters, directors, and movers of the press (*y*), those who daily *min- [*cviii] ister to their information and curiosity, are their purvey-

(*y*) Such observations are still more pertinent, where the public, by means of the trial by jury, possess the salutary and constitutional means of control. Upon this subject, Lord Camden, on an occasion of great importance, thus expressed himself. Case of seizure of papers, 11 St. Tr. 328.

“ Before I conclude, I desire not to be understood as an advocate for libels. All civilized governments have punished calumny with severity and with reason ; for these compositions debauch the manners of the people ; they excite a spirit of disobedience, and enervate the authority of government ; they provoke and excite the passions of the people against their rulers, and rulers oftentimes against the people.

“ After this description, I shall hardly be considered as a favorer of these pernicious productions. I will always set my face against them when they come before me ; and shall recommend it most warmly to the jury always to convict, when the proof is clear. They will do well to consider that unjust acquittals bring an odium upon the press itself, the consequence whereof may be fatal to liberty ; for if kings

ors and agents. In the discharge of the important and lucrative office of catering for and ministering to the literary appetite of the public, it is manifest that candidates for popular favor must consult the public taste, and that, as there will never be wanting talent, ability, and diligence, adequate to the enlightening and improving the public, so long as veracity, integrity, and ability, are recommendations to their patronage; on the other hand, agents will always be ready to prostitute their talents for the gratification of a corrupt and vitiated taste.

The real corrupters of the press are the public themselves, and the licentiousness of the press, though it tend greatly to increase the evil, is yet to be regarded rather as symptomatic of a defect in public morals, than as the cause of the declension.

If a man patronises a series of licentious publications by purchasing them, or even contributing towards the purchase, what right can he have to complain of the impurity of the public press, the immorality of the age, or the inadequacy of municipal restraint; it is he who offends against truth, against decency and morals, [*cix] who, *with some thousand others, encourages and supports, in a state of affluence, the less guilty minister of the press; the latter publishes that which is scandalous and impure, merely because, so long as he finds it lucrative to do so, he must necessarily suppose that he gratifies those who pay him for such services. In point of morals, to contribute to the existence and diffusion of noxious and offensive publications, is to share largely in the guilt.

In short, as there can be no greater security for the truth and honor of public, or the integrity of private men, than the wholesome apprehension of public censure, it is of vital importance to society to consider that the preservation of this mighty and salutary moral power, efficacious and entire, rests wholly with the people themselves; that they must not look for effectual protection from the municipal law, or expect a remedy for the natural consequence of their own

and great men cannot obtain justice at their hands by the ordinary course of law, they may at last be provoked to restrain that press, which the juries of their country refuse to regulate. Where licentiousness is tolerated, liberty is in the utmost danger, because tyranny, bad as it is, is better than anarchy, and the worst of governments is more tolerable than no government at all."

supineness; and that, if by culpable and careless indifference, they suffer the public press to be corrupted and perverted to evil purposes, they not only reject a mighty engine adequate to the protection of their best interests, but surrender it to enemies who will fatally apply it to undermine the very foundations of social happiness.

The abuse of the liberty of the press tends most directly to deprive it of all salutary and beneficial power. The influence of public opinion on political conduct, operates on a mixed principle of shame and of interest, remotely, perhaps, on a feeling of fear, but nothing can more strongly tend to obliterate the sense of shame, and to render men's minds obtuse and callous to the impression of public opinion, than daily attacks *upon character, dictated by party feeling, and promulgated to the world by a corrupt and venal press. The tendency of a system of misrepresentation, consisting of illiberal abuse on the one hand, and of impure panegyric on the other, must be to confound guilt with innocence in the opinion of the world, to render men equally deaf to the voice of censure or of praise; and when they were no longer deterred from acts of political apostacy and violations of public faith by a principle of shame, it is obvious, that those very motives of self-interest, which, connected with the love of character, constitute valuable incentives to useful, laudable, and honourable exertion, would, without such a corrective, tend to the most selfish and unworthy actions; all restraint founded in fear would cease, when the honest fervour of popular indignation had degenerated into the mutual hatred of contending factions. [*ex]

Next as to limits of penal restraint. The limits of such restraint must depend on the *nature, quality*, and consequences of the communication; 2ndly, on the *act* of the party who makes it, and the means of communication used; 3rdly, on his *intention*; or, 4thly, on *circumstances collateral* to the act.

First, then, as to the nature, quality, and consequences of the communication. As the very object of coercion is the *prevention* of public mischief; it is by no means essential to an offence of this nature, that the criminal object of a noxious publication should have been actually accomplished; it is sufficient that the communication should directly and immediately *tend* to produce mischief to the public.

[*cxi] *And this, for several reasons, both because actual proof of evil consequences to the public would, from the very nature of the case, be frequently impossible, though highly presumable ; and, 2ndly, because where great mischief is to be apprehended, it is far more politic to interfere at an early stage, and to arrest the progress of the evil, than to wait for its consummation ; and, 3rdly, because, as far as regards the moral guilt of the offender, his offence is completed by the very act of publication.

Hence, as far as the evil consequences of a publication are concerned, it is necessary that the offence against the public should be defined and limited, not by the *effect* actually produced, but by the *tendency* of the matter published to produce it. If, for instance, an individual, with a view to his own private gain, were to publish an address, inciting a discontented populace to burn all stacks of corn within a particular district, the law of the country would be absurd and contemptible, which provided no punishment for so daring an outrage, until proof could be given that some incendiary had destroyed his neighbour's property, in compliance with so unprincipled a recommendation. The very attempt to excite to the commission of such outrages is in itself a dangerous violation of the principles of morality and natural justice : on the question whether such an attempt ought to meet with immediate reprobation and punishment, no conflict of opposite advantages and disadvantages could possibly occur,

it would clearly be for the benefit of the community, that [*cxii] so atrocious an attempt should *be checked by penal visitation at the very earliest opportunity.

It is obvious, that it must not only be necessary to restrain communications which tend directly to a breach of the law, by inciting others to the actual commission of crimes prohibited by the law, but also those which tend to the subversion of religion, or, in general, to the destruction of the principles of virtue and morality, which are essential to good conduct, order, and decency. Again, it is plain, that the *degree* of tendency cannot be material as a limit to the offence, whatever its operation may be in adjusting the quantum of punishment. First, because *any* tendency to produce public mischief, must, *pro tanto*, be injurious to society ; and secondly, because the extent to which the mischief may be tolerated, is not capable of any precise definition.

Complaints have not unfrequently been made, even in this country that the law of libel is to vague and uncertain, and that neither the common nor the statute law sufficiently define what constitutes a libel.

It may be of use to consider whether absolute and certain prohibitions are not excluded by the very nature of the subject matter, and whether, if such were imposed, they must not either consist in general and peremptory rules, which would encroach greatly on the freedom of communication, or in minute and specific ones, the particularity of which would subject them to the easiest evasions. The law may either totally prohibit all discussion on a particular and specific subject or may go the length of tolerating all that can be said or written upon it ; but there is scarcely any question, either of *general or individual interest, in respect [*cxiii] of which total prohibition or entire toleration would not be prejudicial to the community. A total prohibition would, in most cases, if not in all, be inconsistent with the great principle of civil liberty, for a penal restraint, would be imposed to a greater extent than was necessary for the welfare of society ; on the other hand, unrestrained license of communication would be liable to the greatest abuse, and open the door to great if not intolerable mischief.

Where it is on the one hand beneficial to society that freedom of communication should be tolerated to a great extent, but where, on the other, it would be highly inconvenient and mischievous to permit unbounded license to the abuse of that liberty, and consequently, where a boundary is necessary, the establishment and preservation of a proper limit, must always be a work of nicety and difficulty. It is, however, exceedingly clear, that the line of interdiction cannot be regulated by any prohibition of particular sentiments or language. Injurious modes of expression are far too variable to admit of any precise rules or regulations, the laws which descend to particulars on such subjects, and which forbid specific expressions, otherwise than by way of example, are usually the work of early and inexperienced legislators, and cannot possibly be of any practical utility, subject, as they necessarily are, to the easiest evasions. Such offences, in truth, admit of effectual description, except in respect of the *effects* which they produce, or which they immediately *tend to pro-*

duce. Any attempt to enumerate, with a view to express, and particularly prohibit all the offensive means by which an ill [*cxiv] disposed *person might attempt to destroy the public sense of modesty and decency, would be impracticable and absurd ; if it be necessary that such practices should be restrained by the municipal law, it is, if not impossible, at least difficult, that the offence should otherwise be described than generally by a prohibition to publish that which, being immodest and indecent, directly tends to corrupt and vitiate the morals of the public. It may be objected that any such general description is uncertain and indefinite. Be it so, what then ? No other inference seems to result, than that human laws do not admit of perfection, and that no general definition can be framed, which shall be applicable to acts capable of infinite variety, with absolute certainty.

The publisher of a libel has no more reason to complain that the law does not precisely define what shall constitute a libel in every possible form which the offence may assume, than a party guilty of any mechanical and corporeal nuisance, has a right to object that the law does not define what precise extent of inconvenience he may inflict on others, without a violation of the law.

A man has a right to exercise his trade, but he has no right so to exercise it as to occasion mischief to the public in the neighborhood of the place where it is carried on. To what extent may he carry it on without offence against the law, and without subjecting himself to criminal responsibility ? Can the law define this otherwise than by the general prohibition not to injure others ; and must not every man, at his own peril, take care so to conduct himself and his affairs, that the public may not be injured ? It would be as reasonable for one who carried on an offensive trade, to complain that [*cxv] *the law had not defined how many cubical feet of foul and pestilential air emitted in a given time, would constitute a nuisance, as for a libeller to object that the law had not defined the precise quantum of noxious matter, which he should be allowed to send forth by the aid of the press, before he incurred any legal censure.

When the law says you are free, use your tongue, your pen, or even the press, at your discretion ; this state of freedom must

still be subject to the condition, that he who abuses his intellectual liberty and powers of offence to the injury of others, must be responsible for that abuse in the same manner as when he exerts his physical strength for such purposes. Liberty, divested of this condition, would be savage, not civilized liberty. But under such a condition, where liberty is the general rule, abuse of that liberty the exception, where so wide a range of free agency is permitted, it is for the agent to take care, at his peril, that he use not his liberty to the injury of others, either in their individual or aggregate capacities.

Where the modes of effecting mischief are of infinite variety, the illegality of acts must usually be defined by their actual consequences or immediate tendency, rather than by any detail of the means used. If a man were to drive another from his residence by setting up a pestilential manufactory in the neighbourhood, it would be a strange defence to say, there is no law which prohibits me from consuming the particular drugs which I used. The law forbids the use of any in such a manner as to occasion such consequences; and when the law says that no man shall be allowed to degrade another from his place in society by deliberate and malicious *publications, which expose him as the ob- [*cxvi] ject of hatred, contempt, or ridicule, with what reason can the offender object that what may render a man odious or contemptible, is not sufficiently defined? It is by the effect or immediate tendency only that such an injury can be described (z).

In the next place, is it essential that the communication be *false* as well as noxious?

The TRUTH of the imputation affords a decisive answer to an action for damages, for the plain reason, that a guilty party has no right to a character free from that imputation; and if he has no right to it, he cannot in justice recover damages for the loss of it; it is *damnum absque injuriâ* (a); but one great object of criminal animadversion is the preservation of public peace and good order,

(z) See the prohibitory definitions of the Code penal of France, *supra*, xxxiii.; of the Laws of Athens, xxxiv.; of Rome, xxxi.; of Scotland, xxxii.; of Spain, *infra*, cxliv. of England, *supra*, xxx., *infra*, vol. 2, 210.

(a) *Supra*, xli.

and those interests cannot be secured without restraining the publication, at least the deliberate publication, in print or by writing, of that which is true, as well as of that which is false; and therefore, though in principle the truth of an imputation be a decisive answer to an action for damages, it is not an answer to the complaint on the part of the public, that the publication tends to disturb the peace of society (*b*).

[*cxvii] *The doubts which have been entertained on the question, whether, with a view to penal consequences, truth may constitute a libel, relate principally, if not exclusively to libels which impute moral blame to individuals, and not to those which do not reflect upon any person in particular, but which are deemed criminal, from their tendency to endanger the security of society, by extirpating, or at least weakening, that sense of religious and moral obligation, upon which the happiness and well being of society so essentially depend. To assert that blasphemous, obscene, and criminal acts may be freely described and represented, because they are true that is, because such things have been acted, would be too absurd a position to be advanced or if advanced, to need refutation.

(*b*) The law of England supplies many analogous distinctions. If A. has a right to a house, of which B., however, is in full possession, if A. were to enter violently with an armed force, and B. were to bring an action, he could recover no damages; for, however improper the mode of entry might be, yet it was no injury to B.'s possession, for he had no title to it; but, with respect to the public, it would be no defence to A. on an indictment for a breach of the peace, to allege that he was the owner, and that B.'s possession was wrongful, for it would be no answer to his having committed a breach of the peace; and though the real owner was entitled to the possession, he was bound to vindicate his right by legal and peaceable means. So if one were to beat or wound an outlaw, the latter could not recover damages, yet the act would be highly penal.

Although the rule that the truth of a libel cannot afford a defence to a criminal prosecution, as it may to an action to recover damages, seems to rest on clear and satisfactory grounds, yet much obscurity and confusion has prevailed on the subject which may fairly be attributed to the doctrines of the civil law. The civil law made no distinction between the criminal and civil liability of a libeller. The consequence has been, that even in this country, where the doctrines of the civil law have been received with a great degree of jealousy, it was long before the point was completely settled, that the truth afforded a complete justification in the case of an action for written slander, any more than it did in the case of an indictment. See the observations of Lord Hardwicke, in *R. v. Roberts*, Sel. N. P. 986.

*Again, where an individual was subject to any personal defect or misfortune, or was unfortunate in any of his relations, if any one on that account were to expose him from day to day, and hold him out as the object of public contempt and ridicule, it could not be doubted that the truth, as was justly observed by a celebrated statesman (*c*), would rather be an aggravation than an excuse, the world being too apt to consider men as contemptible for their misfortunes than as odious for their vices.

Suppose then, that the alleged libel imputes some legal or moral delinquency to another, is then the truth, the *veritas convicii*, as it has been termed by the civil law, to be admitted as a justification? Now, previous to making a few observations upon this point, as a mere question of legal policy, that is, of general expediency, into which it must ultimately be resolved, it may not be improper briefly to remark upon the ordinary popular objection made to the doctrine that truth may be a libel. It is seldom that the public voice exclaims against a law in the absence of all reason for complaint; whenever, therefore, that voice is heard, all thinking men will listen to it with attention, a benefit will be attained, either by amendment of the law, where the complaint is well founded, or by reconciling men's minds, where it can be shown that the complaint is erroneous, and that the law is just.

The popular objection to the doctrine that truth may be a libel, arises partly from the want of a full understanding of the grounds and extent of the rule, but *chiefly and principally from a misapplication of an honorable and generous feeling in favour of truth. [*cxix]

The notion that the publication of that which is true ought not to be deemed criminal, is fallacious in a moral as well as in a legal point of view; it is, in effect, to assume that the means must sanctify the end, and that a good instrument cannot be perverted to unworthy and pernicious purposes. To assert that the truth may in all cases, and under all circumstances, be published, is a position as erroneous in morals as in law; truth, as well as falsehood, may be used as the instrument of creating misery, and where the object is immoral,

(c) Mr. Fox, in the debate on the Libel Bill, vide *supra*, lxx.

the means by which it is attained, cannot be innocent. If a man were suddenly to communicate to one, in a weak state of health, some very afflicting and distressing intelligence, with intent that the suddenness of the shock should produce instant death; would not the executed purpose amount, in *foro conscientiae*, to murder, and would not the plea be frivolous and absurd, that the fact was true?

If the means, in a moral point of view, be regarded as material, the effect must be to aggravate the offence, in consideration that truth has been perverted and made the instrument of perpetrating a crime.

The communication of the truth may not unfrequently constitute a most treacherous fraud, criminal in point of law, as well as morals; for, in some instances, it is essential that the law, should impose silence, and that even under the obligation of an oath. In all such instances, the consideration that *the truth* is revealed, so far from affording any excuse, constitutes the crime.

[*cxx] *With reference to one of the principal grounds on which the publication of a defamatory libel is to be regarded as an offence against the public, and without reference to any considerations of extrinsic policy, it seems to be sufficiently plain that the truth of the imputation ought not to be admitted as a defence inasmuch as it is quite consistent with the mischief intended to be prevented.

As any direct solicitation to violate a law devised for public security, must needs be an offence against the law, every solicitation to break the public peace must in principle be penal. For as no laws can properly allow that to be effected by indirect means, the direct doing of which is prohibited, it follows, that it would be inconsistent that a law, which provided for public security, should permit its provisions to be in effect violated, by allowing the publication of defamatory imputations, which tended immediately to disturb that security. The law therefore, which prohibits such offences, does so for one reason at least, which is wholly independent of the consideration whether the imputation be in itself true or false.

If, then, without reference to any consideration of extrinsic policy, but looking only to the end and object of penal restraint, the

truth of a defamatory communication ought not to constitute an exception in favour of the publisher, how stands the question on grounds of extrinsic policy?

On the one hand, to give a general and absolute license to publish that which was true concerning others, however defamatory in its nature and injurious in its consequences, and without any exception as to motive, *even though the act were [*cxxi] done with the illegal intention to provoke another to acts of aggression and violence, would necessarily and unavoidably occasion frequent interruptions of the public peace, personal conflicts, broils, and bloodshed, the natural issues of personal affronts. It is also obvious, that if the law were to tolerate the publication of criminal charges by one subject against another, under the condition that the accuser, when called on, should establish its truth in a court of justice, a new and anomalous tribunal would in effect be enacted of a dangerous and mischievous description. Suppose, that the accused defers to the jurisdiction, and puts forth his answer, which, in most cases, would be of a recriminatory nature, who are to be the arbiters? The public. And what means has this extraordinary jury of deciding on conflicting statements? what can be the result but mutual exasperation, if not violence? Let it even be supposed, that the delinquent is convicted in the judgment of the public, the penalty, no doubt, is severe—forfeiture of character, but even where such were the result, an evasion and default of justice would be occasioned by withdrawing the cognizance of the crime from the ordinary legal tribunal where the offence would have been punished according to the wisdom of the law, and loss of reputation would have been a collateral but just and certain consequence.

It requires, however, little of observation or argument to show the inconvenience of permitting deliberate charges of specific crimes to be made otherwise than according to the ordinary course and forms of justice, provided by the law itself. It would, obviously, *be inconsistent with the first principles of legal [*cxxii] policy, that criminal accusations should be thus made before an incompetent and self-constructed court, to the neglect of the legal and appropriate tribunals. Even where such extrajudicial charges were true, the consequence would at least be delay, and

usually an utter evasion of justice. Although these observations are not wholly applicable, where the defamation does not consist in the imputation of a crime cognizable by the law—for justice, in such cases, is neither evaded nor delayed; yet, as far as regards the hardship to the individual, or the mischief to the public, the evil may be equally great.

It may be strongly urged that, to allow this would be in effect to extend the criminal code indefinitely, to make every breach of moral obligation, every sin against conscience, a crime of temporal cognizance. If general license were given for every one, as he pleased, to publish such delinquencies with impunity, so as he could afterwards prove them to be true, it is obvious, that every such justification would be equivalent to a judicial charge, the penalty forfeiture of character, and thus every defamation, through the medium of a public newspaper or journal, might be but preparatory to a formal and judicial inquiry. To tolerate such a proceeding, would, it is plain, be highly mischievous and inconvenient. To such an extent as is consistent with public good, it is for the law to define offences, and to punish offenders; but beyond this pale, must always exist an indefinite multitude of offences against morality, which the law does not visit, for the plain reason, that a greater degree of [*cxiii] mischief and *inconvenience would result to society from interfering with such delinquencies, than benefit from attempting to prevent them by the aid of penal censures. To allow such a justification in a criminal proceeding, would be to defeat the policy of the law in this respect. This argument may perhaps be met with the observation, that, notwithstanding the inconvenience which may result from the investigation of mere moral delinquencies, it has already been admitted, that such a justification ought to be allowed as a defence to the claim for damages in a civil proceeding. The answer is, that the cases are not parallel; the admitting such a justification, in the civil proceeding, is a matter of necessity, arising from the very nature of the claim to damages, and which it would be impossible to avoid, without violating the essential principle on which the civil remedy is founded, and allowing a delinquent to make a profit of his crimes. In the present instance, no such necessity or difficulty warrants an extension of the inconvenience; here the aggrieved

party who seeks redress is the public, not the individual defamed ; and the public is entitled to security, though the charge be true, and though the individual may have no just title to damages.

In the next place, it may well be contended, that to permit such a justification as a defence for publishing an extrajudicial charge of a specific crime, would frequently be attended with positive injustice to the party defamed, and would open a door to great mischief and oppression.

How frequently must it happen that the self-constituted public accuser knows the facts but imperfectly, *and, [*cxxxiv] consequently, how great a temptation would the allowing such a justification afford to malicious and ill disposed persons to venture upon bold and confident charges, which, after all, could not be substantiated. Again, absolute and positive injustice would frequently be done in creating a general and public prejudice on the very subject to be afterwards tried, by allowing the whole proceeding to be, as it were, prefaced by an *ex parte* and highly colored representation of the facts ; circumstances might be stated in support of it, which would not be legal evidence on the trial, but which those appointed to decide, whose minds had been previously occupied and excited by an unfair representation, might not be able to dismiss from their consideration (d).

But, suppose the prosecution to be instituted not by the party defamed, but by another, it is plain, that the greatest injustice might be done in proceeding to an investigation of the charge alleged, which so deeply involved his character and reputation, without affording him the opportunity of defence.

(d) And therefore, the admitting such a justification would be wholly inconsistent with that wholesome principle recognized by the law of England, and also of Scotland, (supra, p. lxxx.) which renders it illegal to publish *ex parte* statements of criminal proceedings, even though they have taken place before the proper tribunal, and upon the ground of which most important criminal trials in this country have been postponed, least the parties accused should suffer from undue prejudice. To hold that the publication of an *ex parte* criminal proceeding before a magistrate is illegal, on account of the tendency of such a practice to divert the fair course of impartial justice, and yet to permit a mere unprivileged, unauthorized *ex parte* statement, not sanctioned by a judicial oath, or by any form or color of legal proceeding, would be, to say the least, highly inconsistent.

[*cxxv] *If this could be done, it would be in the power of any two ill disposed persons most effectually to ruin the character of a third, by the intervention of legal process. And even, if legal machinery could be devised for the purpose of making that third person a party to the proceeding, which absence or other circumstances would frequently render impracticable, it would be a most intolerable hardship that every man should thus in effect be liable to be subjected to the expense, trouble, and anxiety of a public defence and exculpation, and that, not with a view to any legal and beneficial consequence either to the public or to himself ; for, if he were to be convicted, he could not upon that conviction be punished, neither would an acquittal afterwards be available to him, against a charge duly made before a competent tribunal.

But if unlimited license to publish whatever was contumelious and defamatory, so as it were true, would be attended with mischief to individuals and public disorder, what, on the other hand, would be the effect of a total prohibition to communicate what was defamatory, whether true or false ? It can scarcely be doubted, that if it were necessary to adopt either the one or the other of these extremes, the former would be preferable. • The resulting evil would be of a more limited extent ; it would leave individuals exposed to insult, and society to frequent breaches of the peace ; these, however, are consequences which cannot fairly be weighed against the mischiefs which would arise from weakening, if not destroying, one of the greatest moral securities by which society are protected,—the influence of public opinion.

[*cxxvi] *But if the adoption of either of these extremes would be prejudicial, limits must be sought for, which, though they do not entirely exclude either of the opposite and conflicting mischiefs, reduce the aggregate amount.

One of the most prominent of the distinctions devised for this purpose, is that which is made between mere oral communications and such as are written.

Though the distinction between oral and written calumny partake of an artificial and arbitrary character ; yet is it valuable, because it is plain and intelligible, and for this reason has frequently been adopted, for the purpose of defining the limits of criminal liability.

The restraining the criminal offence to written defamation is a provision which, whilst it leaves the ordinary communications incident to the daily business of life unfettered, at the same time guards against the mischiefs which would result from unlimited license, by subjecting to punishment all such as are guilty of the more deliberate, studied, and therefore, more malicious attacks upon character the more dangerous and injurious, as being more permanent in their nature, and more capable of a wide and extensive circulation. This, therefore, is a mode of restraint, which, whilst it leaves open considerable channels for communications affecting character, yet visits all those attacks upon reputation to which the foregoing remarks on the necessity for penal restraint more particularly apply. To make mere oral communications penal, whenever they reflected on the characters of individuals, would be a heavy restraint on the ordinary intercourse of mankind, and would necessarily and unavoidably occasion much and vexatious litigation; on the other hand, the making written and defamatory *charges penal, without [*cxxxvii] regard to their truth or falsity, diminishes far less than might at first sight be expected, from the great securities for the discharge of legal as well as moral obligations, the love of reputation, and the fear of public censure and disgrace.

But, in the next place, any evil consequence which might otherwise result from subjecting written defamation, without regard to its truth or falsity, to penal censures, is best corrected by exempting largely from penal liability in all cases where the party acted with a fair and *bonà fide* intention, with a view to a recognized legal object; and this, without regard to the truth or falsity of the communication in fact; for, in numerous instances, where the party acts honestly in pursuit of a legitimate object, it is far more consonant with the principles of natural justice and sound policy to make his criminality depend on his motive, rather than on the result of an investigation as to the truth of the matter published. One man may violate the principles of honour and justice, and the dictates of his own conscience, though he publish that only which is strictly true; whilst another may act under the influence of strong moral feeling, in publishing what he believes to be true, but which turns out eventually to be false.

If the confidential depositary of a secret were to betray his friend, from a motive of malice and revenge, he would undoubtedly stand in the first predicament; were a man, under a *bona fide* belief that another had committed a fraud to warn a friend, in confidence, against trusting that other, stating his reason, it would, provided he acted with reasonable caution, be contrary to natural justice and the ordinary principles of criminal jurisprudence, that he [*cxxviii] should be *dealt with as a criminal, merely because he happened to be mistaken. The consideration, however, of the circumstances, which ought, when united with an honest intention to protect the party against criminal censures, belongs to another place; it is noticed here, merely for the purpose of showing that the punishment of written defamation, notwithstanding its truth, is capable of such modifications as may, to a great extent, secure the public from any injury which could arise from impeding those ordinary communications affecting reputation, which are of such great importance to society.

Another material consideration connected with the present subject, is, whether the truth of the defamatory imputation should not be allowed to be shown in mitigation of punishment, although unavailable as a complete defence, inasmuch as it is offensive to men's sense of natural justice, that one who published that only which was true, should undergo the same measure of punishment as if he had in addition basely invented the slander. If, however, the party reflected on were not the prosecutor, it would be hard upon him to make his conduct the subject of public inquiry, where he had no means of defending himself by becoming a party to the inquiry; and even supposing that he were the prosecutor, and had an opportunity of meeting the charge, it would be highly inconvenient (*d*), that the guilt or innocence of the prosecutor, should thus be brought into question in such a collateral investigation, the more especially where he was charged with having committed an offence [*cxxix] of which the ordinary criminal tribunals have *cognizance.

It remains, however, to be emphatically observed, that if the defendant, in such a case, is not to be admitted to show that

what he published was true, it follows, as a strict and necessary consequence, that no greater punishment ought to be inflicted upon him, than would have been, had he been permitted to prove and had actually proved that the fact was true; for the truth is in principle excluded, because it is merely collateral and immaterial to the nature and extent of the offence: and if immaterial, no greater punishment ought to follow, than if the fact were true; it would obviously be unjust, first, to exclude a party from proof that what he published was true, and then to punish him with a greater degree of severity, as for publishing what was false, or at least not established as true.

2nd. Next, as to the *act* of the party, and the means of communication used.

In the civil proceeding to recover a compensation in damages, a publication of the slander is absolutely essential; without it, no damage can have been sustained in fact, and none can in principle be presumed. In respect of criminal animadversion, the case is different; it is a mere question of policy and expediency, whether the law shall interfere to prohibit, and in consequence to punish any act or dealing, in respect of a libel, anterior to an actual publication.

The first step is to conceive the mischievous and illegal matter of the libel, then to commit it to writing or print; it is by the act of publication that the offender, abandoning his *locus pœnitentiæ*, absolutely and conclusively inflicts the injury on society.

*That the actual publication of that which is fraught [*cxxx] with danger and mischief to society, is to be regarded as penal, seems to be as clear a proposition, as it is, on the other hand, that the mere abstract intention to do mischief, unaccompanied by any act, ought not to be subjected to penal visitation (*e*);

(*e*) A man's secret intentions, and even actions, are rather the subject of moral than of legal restraint, and they do not properly become the subject of penal visitation, until the necessity for coercion has been manifested by some overt act, tending to the prejudice of society.

Marsyas dreamt that he had cut Dionysius's throat; Dionysius put him to death, pretending that he would never have dreamt of such a thing by night, if he had not thought of it by day. This (says M. Montesquieu, b. 11, c. 12.) was a most tyrannical action, for though it had been the subject of his thoughts, yet he had made

whether the intermediate acts of writing or printing a libel, with intent to publish, ought also be deemed criminal, is at least a fair question of legal policy. That such an act might properly be made penal, provided such a law were, on the whole, beneficial, seems to be manifest, for acts of forgery are usually considered to be consummated crimes of great magnitude, although they be done in secret, and without subsequent voluntary publication. It is, however, to be apprehended, that to punish with strictness and effect, the mere writing or printing of a libel, would be attended with more of mischief than of benefit to the community. Unless means were devised for subjecting men's private closets to rigorous examination, founded on mere suspicion, such a law would be nugatory ; it would rarely indeed be known that a man had [*cxxxi] composed and written a libel, unless he had himself *in some way published or divulged it, and where that was the case, the law would cease to be necessary. On the other hand, the hardship and insecurity which would result to society from subjecting their private muniments and writings to examination by police officers, would be a public inconvenience of the most intolerable description. And though no such power should be given to search on mere suspicion, yet would it frequently happen that the inferior ministers of the law would be ready, on many occasions, to run the risk of consequences in the expectation of detecting cause for accusation against suspected or obnoxious persons.

In the next place, do any limitations arise from the *means of communications* used ? If penal restraint were to be made strictly commensurate with the evil which calls for restraint, there would be no more reason for making penal responsibility than for making civil liability, to depend on the mere means of communication. For, it is plain, that the mode of communication cannot alter the vicious and mischievous nature of the matter communicated, though it may considerably affect the extent and duration of the mischief.

If a written incitement to an evil act tend to produce mischief to the public, so also must an oral one ; and, therefore, if the former

no attempt towards it. The laws do not take upon them to punish any other than overt acts.

is on that account to be deemed criminal, so ought the latter. The two modes may indeed differ as to the extent of the mischief likely to be occasioned ; the former is capable of being widely circulated, and for a length of time ; the effect of the latter is likely to be more local and more transitory ; this, however, is but casual and contingent ; an inflammatory and seditious speech, addressed to a multitude on an *occasion of great excitement, may [*cxxxii] produce effects far more mischievous and lasting than if the same speech were written or printed, and communicated to but a few. Contumelious and insulting expressions applied to a party in his presence and before a large assembly may be infinitely more injurious and provocative than if the same had been written and sent to him. At all events the difference of mode cannot, in point of principle, alter the criminal quality of the act, but merely affords room for a distinction in admeasuring the punishment.

When, however, considerations of extrinsic policy are taken into the account, and allowed to operate in restraint of criminal liability, it is obvious that a distinction, founded on the mode of publication, including, within its scope, such modes as by their capability and facility of diffusion, and permanency, must ordinarily be considered as the more dangerous, as by printing or writing, and excluding such as are merely oral, may well consist with general convenience.

Some observations have already been made, with a view to show that, as far as the civil remedy is concerned, there is no sound distinction between oral and written slander ; in reference, however, to penal censures, there are several reasons for confining the penalties in respect of personal defamation to written publications. In the first place, to extend the offence to oral defamation generally, would be inconvenient, because it would give rise to many vexatious prosecutions, and would create far too large a restraint on communications involving character. In the next place, the proof of an offence committed by the writing and publishing of illegal matter, is far more definite and satisfactory *than where the of- [*cxxxiii] fence is merely oral, when so much depends on tone and manner, the situation of the speaker, the circumstances under which he spoke, the understanding and memory of the hearers. On this

account it is that the municipal laws of different countries so frequently found a distinction between what is written and that which is merely spoken (*f*).

This relaxation, however, founded, as it is, on a principle of convenience, cannot properly be extended beyond those communications which usually occur in the ordinary intercourse of society, in which the character and reputation of particular members of that society must necessarily and frequently be involved. It would be highly inconvenient that men's tongues should be fettered on such occasions, by the perpetual apprehension of criminal prosecutions. It is plain, that no direct solicitation to violate the law can by possibility fall within any principle of expediency, so as to derive protection from it.

The law of England has not only made a distinction in respect of the *means* of communication, but has also adopted the word *libel* as a particular and technical term, by which communications of an immoral or illegal tendency, made by means of writings, pictures, or signs, are distinguished from those which are merely

[*cxxxiv] *This distinction and the grounds of it, will more properly be adverted to hereafter, when the provisions of the law of England on the subject are discussed.

3rdly. It is next to be considered how far the *motive* of the party, and the *occasion* of the publication are material, either to constitute or repel the conclusion of guilt, where a publication has been effected of noxious and illegal tendency.

It seems, on the one hand, that a mere wicked and mischievous intention, unless it be conjoined with some publication of noxious and illegal matter, cannot constitute an offence against mere muni-

(*f*) See Montesquieu's Spirit of Laws, b. 12, c. 12. Hence it is, that, according to the law of England, mere words spoken do not constitute an overt act of treason, *infra*, vol. 2, p. 167.

(*g*) 4 Comm. 150. This definition, though perhaps sufficiently proximate for all practical and useful purposes, does not precisely agree with the ordinary sense and meaning of the word, for it would include an express written solicitation to commit a crime, which does not, perhaps, in strictness, fall within the ordinary notion of a libel; yet, inasmuch as the very essence of a libel consists in its tendency to produce some public or private mischief, such a solicitation conveyed in writing, seems properly to fall within the meaning of the term.

cial laws ; in other words, that mere abstract intention is not punishable by a human tribunal. If a man, intending to publish a most atrocious libel, were by mistake to deliver the gospel instead of the book in which the libel was contained, though in moral point of view, his guilt would be just the same as if he had published the libel, yet he would have committed no crime against the law, unless that law took cognizance of mere abstract intention, unaccompanied by any definite criminal act. On the other hand, it appears to be equally manifest, that where any act is by the law defined to be illegal and criminal, every one is punishable who voluntarily does the prohibited act, without some legal justification or *ex- [*cxxxv] cuse, furnished by the occasion and circumstances, and without regard to his real motive and intention. To hold that a man should be absolved from penal responsibility, merely because his motives were kind, benevolent, and philanthropic, would be to set the private opinion and conscience of every one above the law to the utter subversion of the law.

For the same reason, it is obvious, that mere abstract intention and motive, where the act is voluntary, cannot, without reference to the *occasion* and circumstances of the communication, constitute any justification or excuse which the law can safely recognize.

The intention of the publisher, in reference to criminal, as well as civil liability, is capable of a threefold distinction ; he may, in the first place, be actuated by a malicious and malignant intention to effect the particular mischief to which the means he uses tend ; or, on the other hand, his object may be benevolent and laudable ; or, lastly, he may be indifferent as to consequences, and act purely from some collateral motive. But mere intention in the abstract, and without reference to circumstances which supply a justification, recognized by the law, cannot supply a test of exemption from criminal, any more than from civil liability.

A man must, in respect of criminal, as well as remedial consequences, be presumed to contemplate and intend the natural consequences of his own act ; if, therefore, the act be calculated for the production of evil consequences, he must be taken to have intended them ; or it may, with greater simplicity, be stated, that the wilful doing of any prohibited act, tending to public injury, is, in

the absence of any lawful excuse, in itself criminal, [*cxxxvi] *legal malice being in all such cases, a mere formal inference of law.

And it seems to be clear in principle, that mere innocence of intention, so long as the act is voluntary and designed, in the absence of circumstances which amount to a legal excuse, cannot exempt the party even from criminal liability. Every man must be taken to know the law; to hold the contrary, would be to confer a premium on ignorance, which would afford a defence for every possible transgression of the law (*h*).

4thly. In the next place, in reference to the *criminal*, as well as the civil branch of the subject, the *occasion* and *circumstances* of the communication may furnish either an *absolute* and peremptory bar to criminal responsibility, or a *qualified* one dependent on the particular motive and intention with which the party was actuated in making such communication.

In the first place, it is in some instances a matter of public policy, arising from the *occasion* of making the communication, wholly to exempt the party from all penal consequences, at least from the ordinary penalties annexed to defamatory communications. The same principle of expediency, which operates to the exemption of a legislator, judge, or witness, from actions for slander, applies to the question of exemption from penal liability.

Thus, if in the course of a legal investigation, a witness [*cxxxvii] should make a deposition greatly injurious to *the character of another, and which would, if published under other circumstances, be criminal, yet it would obviously be impolitic and inconvenient to permit a penal prosecution to be maintained against the witness, in respect of his deposition, founded on a mere suggestion, that his intention was malicious; for it would necessarily be a great hindrance to such inquiries, if the motives of witnesses could be afterwards brought in question. Though his motive in becoming a witness might be most malicious and immoral,

(*h*) Ignorance of the law excuses no man; not that all men know the law, but because it is an excuse every man will make, and no man can tell how to confute him.—Selden.

his testimony might be true and essential to the purposes of justice. Corruption on the part of a judge, or perjury on that of a witness, must necessarily be crimes of great magnitude under every system of laws; these, however, are very distinct and different offences, and are not connected with the present subject.

In the next place, the occasion and circumstances of the communication may supply a *qualified* defence, dependant on the actual intention to injure. The constituting a large and extensive barrier, for the legal protection and immunity of those who act *bonà fide* and sincerely, according to the occasion and circumstances in which they are placed, is not only just, in a moral point of view, and advisable as a measure of policy, but is absolutely necessary for the purposes of civil society. Were the mere probable effect and tendency of a publication to be the criterion of guilt, without reference to the real motive of the author and the occasion and circumstances under which he acted, the rule would be far too extensive for the convenience of mankind, and the evil resulting from the prohibition would greatly out-weigh the opposite advantages to be derived from it.

*It is indeed very possible that a party, actuated by [*cxxxviii] the very best intentions, may propagate erroneous notions, but so long as he urges those opinions *bonà fide*, believing them to be just, and intending to do good, his errors are not likely to prevail against the better sense and judgment of mankind to a very serious and prejudicial extent; and the contingent and casual publication of erroneous opinions cannot be placed in competition with the splendid advantages which flow from permitting full and fair discussion on every subject of interest to mankind, as connected with religion, politics, philosophy, and morals.

The security of the public, in this respect, is amply provided for by distinguishing between that which is published, with a sincere and honest, though unsuccessful intention to do right, and malicious attempts to injure society in general, or individuals in particular, by profane, blasphemous, seditious, immodest, or defamatory communications.

This general principle embraces not only all communications made on subjects of public interest, but also those which affect the

characters of private persons, provided they be made in the discharge of any legal, or even moral duty, and in a manner suited to the occasion. Here the boundaries of criminal as well as civil liability seems to be identical.

In all such cases, though the tendency may be of an injurious nature, it is a question whether the party was really actuated by a good and honest intention, as suggested by the occasion and circumstances under which he published, or whether he made use of that occasion as a cloak for carrying an injurious and [*cxxxix] malicious *design into effect. The real intention of the party is the proper test of criminality, and legal is commensurate with moral delinquency.

Here a question of considerable importance occurs : though the truth of a slanderous charge may be no justification, yet in those instances where malice in fact is the test of criminality, where the question is, whether the publisher acted sincerely, or merely maliciously, and not with reference to the occasion, ought it not to be admitted, at all events, as collateral evidence to shew the true state of his mind ? Thus, suppose that A. writes a letter to B., stating the latter to have been guilty of disgraceful conduct, and that the defence is, that the letter was written for the purpose of admonition and advice, not with a view to injure or offend B., but in order to amend and reclaim him. In such a case, the question would be, as to the sincerity of A. ; if he were sincere, it would be contrary to sound policy and natural justice to punish him as a criminal ; if he assumed the mask of friendship, in order that he might wound with impunity, he would deserve, for his hypocrisy, a higher degree of punishment. Now, as the issue would, in such a case, be on the mere fact of sincerity, it is manifest, that if the prosecutor could show that the imputation was false in fact, and that A. *knew* it to be false, this would at once be decisive to show that he did not act *bonâ fide* ; and although, on the other hand, proof that the facts were true, or that A. believed them to be true would not be absolutely decisive as to his sincerity of intention, yet still there can be no doubt as to the materiality of such evidence.

[*cxl] *In such cases, one of three courses must necessarily be adopted, either, first, to assume the *falsity* of the im-

putation ; or, secondly, to assume its *truth*, (or at least not to assume its falsity ;) or, thirdly, to admit evidence of the fact. The first of these must at once be rejected, so inconsistent would it be with reason and natural justice, to subject any one to *punishment* on the *assumption* of a fact, without permitting him to disprove it. Each of the other alternatives would be attended with its peculiar difficulties : it would be highly inconvenient to try a collateral charge against the prosecutor, or it may be a stranger, far more heinous, than the principal one against the defendant. On the other hand, were the truth to be presumed, or at least the falsity not assumed, a malicious libeller might be acquitted, of whose malice the most decisive proof might have been adduced. The latter, however, would probably be the less inconvenient consequence of the two, for many of the most weighty objections against admitting the truth of a personal and defamatory charge to afford ground of justification or excuse, would also apply to the exclusion of proof of the fact as collateral evidence. It is also to be recollected, that, after all, the truth or falsity of the charge would not be the real question, and would be material, so far only as it tended to show the real intention of the party who made it ; and, therefore, even admitting the fact to be true, still the prosecutor would be at liberty to show that the defendant did not act on any belief of the truth, or even if he did, that he was actuated by a malicious intention to injure or offend, and not with a fair and honest intention to effect a beneficial object ; and on the other hand, the defendant *would be at liberty, even though he [*cxli] admitted the imputation to be false, to show that he believed it to be true, and that he acted on that supposition with a *bonâ fide* intention (i).

(i) The law of England, it will be seen, on the trial of an information or indictment for publishing a defamatory libel reflecting on an individual, excludes evidence of the truth of the contents, though it be offered merely with a view to prove or disprove the malice of the publisher.

It has been strongly urged, (see the *Edinburgh Review*, for the year 1816,) that in thus rejecting evidence of the truth, injustice is done ; and it must be admitted at once that to exclude such proof, and, at the same time, to raise any presumption that the charge was false, because it had not been proved to be true, would be productive of gross injustice to a defendant in such a prosecution. On the other hand, although to exclude proof that the charge was false, and,

[*cxlii] *The degree of punishment to be inflicted, in respect
[*cxliii] of a noxious and illegal communication must *necessarily

which is still more material, that the defendant *knew* it to be false, would be to exclude the most cogent evidence of malice, the consequence would be less repugnant to men's sense of natural justice, inasmuch as it is preferable to err on the side of mercy, especially as the defect might frequently be supplied by other evidence, so seldom does it happen that the same malicious feeling, which is strong enough to cause a party to invent a deliberate fiction, does not also betray itself by collateral indications. The effect of such an exclusion is also diminished by the consideration that the objection is applicable only to that intermediate, though large class of cases, where *actual malice* is the proper test of guilt; and that against the inconvenience which no doubt must result from excluding such evidence in this class of cases, are to be set off those opposite inconveniences, already adverted to, which would arise from the admitting such evidence: the necessity for inquiring into the most serious and complicated criminal charges in a collateral proceeding of far less importance; the constituting a tribunal for indirectly trying moral offences, of which the law itself takes no cognizance; the danger to be apprehended to the public peace from permitting insults to be offered where the truth can be proved, without restraint, and thus driving men to avenge such insults by violence; and last, but not least, the hardship which would be occasioned to individuals in permitting their conduct and reputation to be put in hazard, it may be collusively, by proceedings to which they are not parties. It has been urged that the same kind of hardship may arise on a justification in a civil action; but there, from the nature of the case, the danger is much limited by the consideration that the plaintiff cannot collusively implicate the character of a third person without injuring his own. If A. were to publish that B. had been guilty of adultery with the wife of C., and on an action for damages brought by C. and his wife, A. were to justify, alleging that the fact was true, the character of B. would no doubt be implicated in the result, though he had no means of becoming a party to the proceeding; but in such a case there would be little probability of collusion between A. and the husband for the purpose of defaming B., when it is considered that the object could not be accomplished except by means of a verdict which recorded the dishonour of C. and the infamy of his wife. In the civil proceeding, therefore, little of abuse or inconvenience can arise from an implication of a third person in a justification of this nature, whilst in a prosecution to be instituted by a stranger, no such restraint on the abuse would operate.

It is true that, as the law now stands, the defamed or injured party is usually the prosecutor, but it by no means follows that prosecutions would be so limited if such a justification were to be permitted, and a recent instance (*R. v. Burdett*, 4 B. and A. 314.) is sufficient to show that characters of third persons may be deeply implicated in prosecutions to which they are strangers.

It has further been urged that, in the criminal proceeding, the real object of legal interference is the protection of the defamed party, and that the injury to the public is but a legal fiction. Now that one main ground of penal infliction in such cases recognized by the law of England, is the protection of individuals, may readily be admitted, but this is not the only one; another and equally important object, as may be collected from the language and decisions of the courts, is the preservation of the

depend much on the species and degree of injury likely to result from the act. It is obvious that, in many *in [* cxlii]stances, it ought to be regulated in analogy to correspond-

public peace, and this may clearly be inferred from the consideration that a publication of a libel is penal, though it be strictly confined to the party defamed; this would be unnecessary if the law regarded merely the injured credit of the individual, but is absolutely necessary, if security to the public be also the object of the law. The same conclusion is to be drawn from the consideration that the law punishes libels on the dead as well as on the living, out of the just apprehension that otherwise the family of the deceased would visit the insult as a personal affront to themselves; and one reason, and that a forcible one, for publishing libels, even on the subject of religion, is the consideration that to revile a man's religion cannot but be regarded as an indirect affront to himself. Were the object of civil and criminal visitation in respect of personal defamation by means of libels identical, it is evident that one and the same process ought to serve for both, and that in England as in Scotland, the prosecutor should be allowed to proceed at once for amends to the individual, and also for the infliction of a fine or imprisonment, if indeed any penal censure ought to follow where the object is simply the protection of the individual, and where the awarding damages would probably be sufficient for the purpose.

But it is urged that the practice of the Court of King's Bench in refusing a criminal information where the alleged libel is true, shows that the protection is of a personal nature. It must, however, be recollected that in granting or refusing criminal informations in case of libels, the Court of King's Bench exercises a discretionary power, acting on principles which are peculiar to that proceeding, and that the practice in the instance of a criminal information for a libel, is not only peculiar to that proceeding but irreconcilable with the ordinary principles of jurisprudence on which the law of England is founded. The general rule is, that the truth or falsity of a libel is immaterial, whilst in this instance it is made the first and essential object of preliminary inquiry,—of an inquiry conducted in a mode foreign to the ordinary forms of criminal justice, not by evidence before a jury, but by affidavits. Such a mode of investigation, at all times unsatisfactory, is the more so where the defendant though the alleged libel be perfectly true, has no means of compelling those who know the truth to establish it by their affidavits; and yet, when the information has been granted, he is excluded from giving evidence of the truth, although the information was granted only on the assumption that the statement was false, a circumstance which necessarily tends to raise an unfavourable prejudice against him on the trial. Notwithstanding such considerations, the result is far more beneficial than might have been expected, or than possibly could have happened, had the practice been general. The truth is, that although the Court of King's Bench is open to all applicants for criminal informations, yet in cases of libel it is seldom resorted to but by persons of rank or wealth. The proceeding by information for a libel is a kind of intermediate course between treating the insult as an affair of honour, and the more vulgar and plebeian course of presenting a bill of indictment at the sessions or assizes. The libelled party has an opportunity of exculpating himself by means of a

ing penal provisions contained in the same code. When such an offence amounts to the *crimen læsæ majestatis*, the offender is of course subject to the penalties of treason. Where the offence consists in a solicitation to commit some other substantive offence, which is in consequence perpetrated, then it partakes of the [*cxlv] *nature of that offence, and is, in effect, but a means of its accomplishment. But where the criminal object is not accomplished, in consequence of such an illegal solicitation, there is room for a distinction in favour of the offender, to allow him the benefit of a *locus pœnitentiæ* (k).

denial of the imputation on his conduct and character in the most public manner, and under a solemn sanction; his adversary is the more ready to make concession where, from the form of the proceeding his character for courage is not implicated, and where the truth of the fact having been solemnly denied, an opportunity is afforded for explanation, concession, or apology. And thus it happens that a course of proceeding which is to a certain extent inconsistent with general principles, is in its limited application rendered beneficial by particular considerations. Men cannot be moulded and adapted to the laws: the laws must be accommodated to men, and not such as they ought to be, but such as they are; and if even a portion of a considerable and powerful class of the community can be induced to submit themselves to the law instead of resorting to violence, this is an advantage to society which it would be unwise to sacrifice for the mere sake of legal symmetry; and the practice may well be permitted without establishing any general rule, even although it be irreconcilable with the ordinary and general principles on which the law proceeds.

(k) Some, it is well known, have supposed that the publication of a defamatory satire was, by the law of the Twelve Tables, punishable with death. Montesquieu, Sp. of Laws. The authority for this is a quotation by St. Augustine (*De Civitate Dei*, lib. 2. c. 9.) from Cicero de Republicâ, lib. 4. c. 10. In that passage, Scipio Africanus, discoursing of the licentiousness of the Greek comedies, speaks thus:—*Apud Græcos fuit etiam lege concessum, ut quod vellet comœdia, de quo vellet nominatim diceret. Nostræ contra xii. tabulæ cum perpauca res capite sanxissent in his hanc quoque sancientiam putaverunt: Si quis occentavisset (actitavisset) sive carmen condidisset quod infamiam faceret flagitiumve alteri.* Præclare, judiciis enim magistratum disceptationibus legitimis propositam vitam, non poetarum ingeniis habere debemus, nec probrum audire nisi eâ lege ut respondere liceat et judicio defendere.

It would be difficult, however, in the absence of stronger and more direct authority, to accede to this position that the Decemviral Code punished this offence capitally, although certainly the *pœna capitis* did not always mean the punishment of death. For, in the first place, the authority is weakened by the consideration that St. Augustine himself does not profess to communicate the exact words even of Cicero. Secondly, the immediate and shocking severity of a law which visited the

*At all events, the punishment ought never to exceed [*xclv] that which would by law have been inflicted, had the

authors of calumnious verses, such as would, in many instances, merit contempt rather than legal penalties, and prove far more fatal to the reputation of the author than to the honour of the object of his attack, affords intrinsic evidence sufficient to excite strong suspicion and doubt upon the subject in the absence of the most direct and certain evidence, of the existence of such a law. Such doubts acquire additional force from a consideration of the sources from which the Decemviral Code was compiled.

The Athenian laws were those which were principally consulted by the framers of the Twelve Tables. Liv. iii. 13. Gell. Noct. Att. xx. i. but they afforded no prototype for such a law. The laws of Solon, it is well known, punished calumniators by subjecting them merely to pecuniary fines. (1 Pet. Leg. Attic. Lycias in Theomnestem.) It is not probable, therefore, *à priori*, that the framers of the new laws would have visited the offense with so incommensurate and vindictive a punishment. It has, indeed, been suggested that this was a part of the *Leges Regiæ*, which was retained in the Twelve Tables. There seems, however, to be no trace of any such prior law: and, from the very passage, as quoted from St. Augustine, it may be inferred, that the law of the Twelve Tables contained the first restraint of that license to defame, which had been abused by the Greek comedians. *Apud Græcos fuit etiam lege concessum ut quod vellet Comœdia de quo vellet nominatim diceret. Nostræ contra duodecim tabulæ, &c.* In the absence of any historical evidence of the previous existence of such a law as part of the *Leges Regiæ*, it is improbable that any such existed in that rude and illiterate æra of the Roman history, previous to the formation of the Twelve Tables, when few were likely to offend by reading, still fewer by writing, satires. That the Romans, however, were in the habit of making and reciting verses when the law of the Twelve Tables was enacted and that those laws contained sanctions to restrain the abuse of that practice, clearly appears. Thus Cicero, (*Tuscul. Disp. lib. 4. c. 2.*) “*Gravissimus auctor in originibus dixit Cato, morem apud majores hunc epularum fuisse, ut deinceps qui accubarent canerent ad tibiam clarorum virorum laudes etque virtutes. Ex quo perspicuum est, et cantus tum fuisse rescriptos vocum sonis, et carmini, quamquam id quidem etiam XII. Tabulæ declarant, condi jam tum solitum esse carmen; quod ne liceret fieri ad alterius injuriam, lege sanxerunt.*” It follows, that so far was Cicero from knowing or supposing that any law existed anterior to those of the Twelve Tables, which punished the author of defamatory verse, that he even cites the law of the Twelve Tables to show that songs were composed at all in that remote age.

Did the Decemviri create such a law for political purposes, and in order to support an usurped authority? M. Montesquieu, the author, at least the supporter of this suggestion, seems to have eagerly admitted the existence of the law for the purpose of building a theory upon it. He attempts to show, that, of the three great forms of government, the aristocratical is that which visits libellers with most severity, and cites this law of the Decemvirs by way of illustration. To confute such a theory would be a departure from our present subject. It is strikingly in opposition

[*cxlvii] offence, *to the accomplishment of which the solicitation or libel tends, been actually committed. This observa-

to the description which Tacitus gives with so much force and feeling, of the *ultimum in servitute* suffered by the Romans under the tyranny of Domitian. But if there be a difficulty in accounting for the origin of such a law, there would be a still greater one in accounting for the approbation which the laws received as well from the Roman people as from their historians. The punishing of those who had libelled illustrious persons, with capital penalties, under pretence of a violation of the *Lex læsæ Majestatis*, was accounted a tyrannical and sanguinary measure in the times of Sylla, Augustus, and Tiberius; what then would have been thought of such a penalty for defamation in an early age of the Republic? How is it possible to suppose that so severe and tyrannical a law would have been favorably received by the people, or afterwards commended by their great historians?—(See Tacitus, *Annal* iii. 27; Livy, lib. 1.)

On the other hand, in addition to the weakness of the proof which can be adduced as to the existence of such a law as part of the Twelve Tables, and the internal evidence which the supposed law affords to disprove itself, it may be observed that the laws of the Twelve Tables did, in fact, prohibit all personal injuries under a pecuniary penalty.

Si injuriam faxit alteri viginti quinque æris pœnæ sunt.

In the language of the Roman jurists, earlier as well as later, the general term *injuria* included a wrong by writing or speaking, as well as by personal violence. Was then a libeller by the same law, punishable by a moderate pecuniary fine, as a compensation to the party injured, whilst his life was forfeited to the state? Or, if the private wrong did not fall within the scope of the term *injuria*, was actual or personal violence punished by a fine only, whilst the slightest injury to reputation, by a song, or by writing, was to be visited by capital punishment? Again, there is great reason for supposing that by the laws of the Twelve Tables, the author of the *Carmen malum* was subjected, not to capital punishment, but to corporal castigation by beating.

The principle of retaliation which was recognized by that Code, was obviously inapplicable in the case of a malignant and satirical poem. To allow retaliation would be but an illusory vindication to an honourable but illiterate man, who had suffered from an offensive and provoking satire; and it is not impossible, that the subjecting the body of the offender to the actual cudgel of the sufferer, might be deemed the approximate substitute for the use of the invisible and intellectual, but rude, powerful, and more galling lash of satire, the application of which, in return, was impossible. Be this as it may, certain it is, that the *supplicium fustuarium* was a punishment inflicted upon libellers by the ancient Roman law, and as many able commentators have, with great reason supposed, by the law of the Twelve Tables. Horace, in his well-known lines, in reference to the *carmen famosum*, not only specifies the mode of punishment, but seems to cite the law which inflicted it as the first which was made in restraint of libels:

tion *ought, however, to be confined to those instances [*clxviii] where the offence consists in the attempt to provoke or

Quinetiam *lex*

Pœnaque lata, malo quæ nollet carmine quemquam,

Describi: vertere, modum *formidine fustis*

Ad bene dicendum delectandumque redacti.

Epist. lib. 11. ep. 1. v. 152.

That the *pœna fustuaria* was inflicted on one class, at least, of libellers, is generally admitted by the unanimous voices of legal as well as poetical commentators. And it is not easy to ascribe this mode of punishment to any other period than that of the Twelve Tables. Cicero, as well in the passage quoted by St. Augustine, from the *De Republicâ*, as in that cited from the *Tusculan Disputations*, expressly refers to the law of the Twelve Tables as the first which applied restraint to the *car-men infâme*. The punishment, therefore, to which the *formido fustis* of Horace refers, could not well be earlier than the law of the Twelve Tables; neither could it well be later, for the context shows that the poet was describing, as matter of history the earliest check imposed by the law on the publication of defamatory verses.

Any later law inflicting such a punishment, must, in all probability, have been enacted previously to the Porcian law, which took away from the magistrate the power of inflicting corporal punishment on the person of a Roman citizen: there is, however, no trace to be found of the abrogation of the capital punishment, and the substitution of the *supplicium fustuarium*, either in that interval or at any other time; nor does it appear that capital punishment was ever inflicted under this supposed law of the Twelve Tables. Some, indeed, have doubted whether the punishment by beating was known to the Decemviral laws, (Hotomann. c. 77.; Dirksen on the Twelve Tables, 511.) and therefore infer that the law cited by Horace is of later date. This however, seems to be erroneous assumption. See Cicero de *Legibus*; Augustine de *Civ. Dei*, Lib. 21. c. 11. *Octo pœnarum genera in legibus continentur, damnum, vincula verbera talio, ignominia, exilium, mors, servitus*: and see Dirksen's *Fragments of the Laws of the Twelve Tables*, ad. tab. 8. fr. 14.

Again, allusion seems to be made to the same law in the *De Arte Poeticâ*

Lex est excepta, Chorusque

Turpiter obtineuit, sublato *jure* nocendi.

It is very difficult, indeed, to suppose that Horace and Cicero did not allude to the same law, when each was speaking of the abuses which had arisen from unrestricted license, and of the legal restraints which those abuses had occasioned. Nor is it easy to suppose that Horace, in the passages cited, referred to different laws. If, however, the law of the Twelve Tables visited this offence with fustigation, it is impossible to suppose that the punishment was capital. It has indeed been suggested that Cicero, in the passage cited from St. Augustine, asserted that the offence was capital by the law of the Twelve Tables, because it was a punishment which *might* produce death, although that was a consequence not only not intended, but prohibited, by the law.—See Heineccius, *Ant. Rom. Ad. Inst. Lib. iv. tit. iv. s. 2.*

[*cxlix] incite *some particular individual to the commission of an offence. For it may receive a great aggravation from

It is, however, difficult to suppose, that Cicero, who himself, in a passage already cited, enumerated distinctly the different modes of punishment authorised and practised by the law, and in which he mentions *Verbera* as distinct from all which could be considered capital, such as *Mors*, *Exilium*, &c. should confound the quality and degree of a higher species of punishment with the effect and possible consequences of a distinct and inferior one.—Be this as it may, it is certain that many critics and able commentators have maintained the opinion that the law of the Twelve Tables punished the offence, not capitally, but by fustigation.—*Fustuarium supplicium constitutum erat in auctorem carminum infamium*. Porphyrio, ad. Horat.—Heineccius. Ant. Rom. Lib. iv. tit. iv. s. 2. *Lege xii. tabularum cautum est ut fustibus, feriretur qui publice inveheretur*—Cornutus ad. Pers. Sat. 1. *Si quis, carmen occentassit quod alteri flagitium faxit, fuste creditor*.—Charondas, S. 55. Dirksen ad. xii. Tab. 515. *Si quis pipulo occentassit carmenve condidisset quod infamiam faxit flagitiumve alteri, fuste ferito*.—Festus.

After all, it is matter rather of speculative curiosity than of practical utility, to inquire whether the decemvirs did or did not annex capital punishment to this offence; if they did, the instance must stand as a solitary and anomalous memorial of barbarous ignorance and cruelty in the annals of jurisprudence; one without a prototype in former, or a parallel in succeeding generations. History, however, records no instance in which this law, if it existed, was ever put in force, and in no succeeding age of the Roman republic or empire, not even under the worst seasons of imperial tyranny and oppression, was the offence of libel *without distinction* made capital, though certainly the punishment of death was annexed in after times to several modifications of the crime. Notwithstanding the charge which M. Montesquieu has urged against Sylla, of having augmented the punishment against libellers and satirists, yet it seems that by his laws they were in general subject merely to pecuniary fines, at least no punishment is mentioned except one. See Matthæus, ad. lib. 47. Dig. tit. 4, s. 4. The Cornelian law annexed to the offence a penalty of a remarkable nature, which has given rise to some doubt: “*Si quis librum ad infamiam alicujus pertinentem scripserit, composuerit, ediderit, dolove malo fecerit quo quid eorum fieret, etiam si alterius nomine ediderit, vel sine nomine de eâ re injuriarum agere licere et si condemnatus sit qui id fecit intestabilem ex lege esse jubere*.” This law, according to some, was meant to deprive a libeller of the right of making a testament. The real meaning seems to have been, that he should be incapable of giving his testimony in a court of justice; an appropriate disqualification, founded probably on the presumption that a man who by a false and *anonymous* charge, whether of a judicial or extra-judicial nature, had deliberately attempted to destroy the reputation of another could not be deemed worthy of credit as a witness.

The fact that Sylla, (Cic. Fam. Epist. 3. 11.) Augustus, and Tiberius, punished those who were guilty of writing libels on illustrious persons with death, under the strained pretence of a violation of the *Lex læsæ Majestatis*, is strong to show that no general law then existed which warranted capital punishment. It is much more probable that they would have enforced or revived an obsolete law than have incur-

its *tendency to produce a widely extended mischief from [*cl]
its influence on numbers. As in the case where an of-

red the odium of such a manifest abuse of a different law. Tiberius, under the pretence that Agrippina, his daughter in law, had indirectly calumniated him, by refusing to eat apples which he knew she did not dare to taste, and which he offered that her refusal might afford a pretext for complaint, and also by her seeking refuge from his monstrous cruelty at the statue of Augustus, caused her to be *beaten* for the supposed calumnies, with such violence as to force out one of her eyes. Not content with such savage barbarity, and jealous lest a more merciful fate should deprive him of his unhappy victim, he endeavored to prevent a voluntary death, by forcing food into her mouth, and even pursued his abominable revenge beyond the grave, by heaping insult on her memory. And yet had this monster the audacity to claim commendation for his mercies.

Quondam vero inter cœnam porrecta a se poma, gustare non ausam etiam vocare desiit, simulans se veneni crimine arcessi, cum præstrucum utrumque consulto esset, ut et ipse tentandi gratiâ offerret, et illa quasi certissimum exitium caveret. Novissime *calumniatus* modo ad statuum Augusti modo ad exercitus confugere velle, Pandatariam relegavit, *convicanitque oculum per centurionem verberibus excussit*. Rursus mori inediâ destinantia, per vim ore diducto, infuleiri cibum jussit. Sed et perseverantem atque ita absumptam criminosissimè insectatus est, cum diem quoque natalem ejus inter nefastos referendum suassisset. Imputavit etiam quod non laqueo strangulatam in Gemonias abjecerit: *proque tali clementiâ* interponi decretum passus est, quo sibi gratiæ agerentur et Capitolino Jovi donum ex auro sacraretur. Sueton. Tiber. c. 54.

By a *senatus consultum*, it was afterwards prohibited, ne quis in alterius injuriam ad statuas principum confugeret imaginesve eorum portaret, qui secus faceret in vincula mitteretur.

In the next place, by a *Senatus consultum*, as well as by several imperial constitutions, the author or publisher of the *Libellus Famosus* was liable to capital punishment. This severe penalty was evidently founded on the principle of the *Lex Talionis*, which called for the infliction of death upon one who had by a false and capital, though secret judicial charge, deliberately practiced against the life of another. The severity of such a law may be accounted for, even though its policy should not be justified, by the consideration, that in those times of cruelty and oppression for which they were calculated, secret accusations of the most heinous and improbable offences were in effect but the instruments used by legal assassins; under the reign of a despotic emperor, suspicion was equivalent to proof; trial to condemnation.—(Gibbon's Decline, &c.) But in order to bring an offender within the penalty of the *Libellus Famosus*, it was, it seems, essential that the charge should be a *secret* one of a *capital offence*; this seems clearly to appear from a very cursory view of the laws themselves. Thus the first constitution of the Theodosian code (which contains a series of enactments relating to such libels, enacts as follows :—*Si quando famosi libelli reperiantur, nullas exinde calumnias patiantur, quorum de factis vel nominibus aliquid continebunt, sed scriptiois auctor potius reperiatur, et repertus cum omni vigore cogatur, his de rebus quas proponendas credidit comprobare, &c.*

[*cli] fender *is guilty of printing and circulating irreligious,
 [*cliii] seditious, or immoral publications amongst society in gen-

Again, in the second, it is observed, “ Qui accasandi fiduciam gerit oportet com-
 probare nec *occultare* quæ sciverit quoniam predicabilis erit ad dictationem publicam
 merito perventurus.”

Again, in the third, “ Famosis libellis fides habenda non est, nec super his ad nos-
 tram scientiam referendum, cum eosdem libellos flammis protinus conducat aboleri
 quorum *auctor nullus* existit.”

Again, by the fourth, “ Famosa scriptio libellorum quæ *nomine accusatoris caret*
 minimè examinanda est, sed penitus abolenda, nam qui accusationis promotione
 confidat, liberâ potius intentione, quam captiosâ et *occultâ* conscriptione, alterius
 debet *vitam* in iudicium devocare.”

By the fifth, “ Non igitur *vita* cujusquam non dignitas concussa his machinis
 vacillabit, nam omnes hujusmodi libellos (scil. famosos) concremari decernimus.”

Again, by the eighth, “ Jampridem adversus calumnias firmissima sunt comparata
 præsidia. Nullus igitur calumniam metuat. Contumelia vero quæ *caput* alterius
 contra juris ordinem pulsat, depressa nostris legibus jaceat, intercيدات furor famo-
 sorum libellorum.”

By the ninth, which was an edict of the Emperors Valentinian and Valens, after-
 wards imported into the Digest, “ Si quis famosum libellum sive domo sive in pub-
 lico, vel in quocumque alio loco ignarus repperit, aut corrumpat prius quam alter
 inveniatur, nulli confiteatur inventum. Si vero non statim easdem chartulas corruperit
 vel igne consumperit sed earum vim manifestaverit, Sciatur se quod auctorem hujus-
 mundi delicti *capitali* sententiæ subjugandum. Sanè si quis devotionis suæ ac sal-
 utis publicæ custodiam gerat, *nomen suum profiteatur*, et quæ per famosum libellum,
 persequenda putaverit ore proprio edicat, ita ut absque aullâ trepidatione accedat, sci-
 ens quidem quod si adsertionibus suis veri fides fuerit opitulata, laudem maximam
 et præmium a nostrâ clementiâ consequetur, sin verominimè vera ostenderit capi-
 tali pœnâ plectetur.”

Sylla, as has already been observed, decreed that to declaim against public officers
 should be deemed a violation of the Lex læsæ Majestatis. Augustus Cæsar, by a
 forced and unwarranted construction, extended the penalties of treason to those who
 libelled illustrious characters. Tiberius followed his example, and in his reign Cre-
 mutius Cordus, charged with having called Cassius the last of the Romans, escaped a
 public execution merely by voluntary starvation. In later times of the empire,
 the punishment of libellers was increased or relaxed according to the temper and
 disposition of the reigning monarch. In the place of a moderate, uniform, and per-
 manent administration of justice upon just and firm principles, was substituted either
 excess of severity or clemency, according to the pleasure of the reigning auto-
 crat. For though the errors were not usually on the side of mercy, yet the Empe-
 ror Theodosius seems to have carried his generosity to a somewhat romantic extent
 in avowing an intention to pardon all maledictions against himself, or the times in
 which he lived. — “ Si quis modestiæ nescius, et pudoris ignarus, improbo petulan-
 tique maledicto nomina nostra credididerit lacessenda ac temulentâ turbulentus ob-
 trecator temporum fuerit, eum pœnâ nolumus subjugari, neque durum aliquid ne

eral, *at the hazard of tainting and corrupting the principles of the great body of society. [*clii]

*It seems to be very doubtful, whether, in point of principle, any penalty by fine or imprisonment ought to be *inflicted, in respect of personal defamation, where the injured individual can obtain complete satisfaction in damages. It would obviously be an inconvenient and unwarranted restraint on natural liberty to impose *a sentence of imprisonment where ample amends could be made to the injured party by awarding damages. The point at which penal visitation ought to begin to attach, either in the absence of reparation to the individual, or in addition to it, is, where either civil reparation cannot be enforced, on account of the difficulty of making the wrongdoer responsible, or where the compelling civil amends, is not sufficient to protect the interests of the public. Thus, according to the law of England, the open taking and using the property of another, is merely the subject of a civil action to obtain compensation in damages, and does not amount to a public crime; but where the taking is under circumstances of secrecy or force, then the civil action being inadequate to the pro-

[*cliii]

[*cliv]

[*clv]

que asperum sustinere, quoniam id si ex levitate processerit contemendum est, si ex insaniâ miseratione digissimum, is ab injuriâ remittendum.”

As to the penalties denounced by the Mosaic law, see above, p. xi; by the laws of Greece, ib. p. xxxiv. of France; ib. p. xxxii; of England, infra vol. ii.

By the law of Spain, he who libels another by a written defamatory libel, (libellos infamatorios) incurs the same punishment that the party libelled would incur if the imputation were true. And in case the libel be in *writing*, the libeller is not exempted from punishment although the libellous matter be *true*. But in the case of oral slander, the party who uttered the words, will be admitted to prove that they were true, if the public were interested in its being known; but if the public be not interested, he is not admitted to such proof, and consequently incurs the punishment, although the slander be true, because no one has a right to insult another; and it is always injurious and unjust to reproach others with their defects or faults, however true they may be. Johnson's Institutes of the Civil Law of Spain, p. 277. By the same law, he who libels another with stigmatising or infamous language (palabras denigrativa) shall pay 1,200 maravedis, and shall be obliged to recant (desdecir) if he is not a hidalgo.—ib. He who libels his father must pay 600 maravedis; 400 to the injured party, and 200 to the accuser.—ib.

tection of society, the act becomes criminal, even in some cases, of a capital extent (1).

The effect of permitting an offender to be visited criminally, as well as civilly, in respect of the same personal injury by defamation, may frequently be to place both proceedings in hazard; a court or jury would in all cases be inclined to diminish the amount of civil damages, where they supposed that the defendant would, in addition to the exaction of those damages, be further subjected [*clvi] to a criminal prosecution and to fine, or even *imprisonment, whilst, after the payment of damages, it may be, exceeding the real injury, a court or jury would strongly lean against a criminal conviction.

The author had purposed to conclude these preliminary observations with a brief historical sketch of the English law, as connected with the subject. Neither time nor space at present permit such a detail, but it may be proper to add a few general remarks in reference to the law of England, addressed principally to the English law student.

Even to the student it is scarcely necessary to observe, that though his immediate object may be to master the details and technicalities of a particular branch of the law, he ought ever to keep in view another object of great importance, and still greater interest,—the acquisition of a more intimate and scientific knowledge of the principles on which the legal system is founded, of its peculiar genius, merits, and defects.

It is further to be observed, that there is no other branch of our own law, of equal importance and complexity, which depends so little as this does on positive legislative enactments, and consequently, so much on precedent and common law principles.

That the common law system, which consists in applying to every new combination of circumstances, rules of law derivable from legal

(1) Although the law of England allows the party libelled to proceed, at the same time, both civilly for damages and by indictment, yet in practice it very rarely happens that the party proceeds in both ways. And where an application is made for a criminal information for a libel, the ordinary condition of granting it is, that the applicant shall not bring an action. Would it not be desirable, that in all cases the party should be restricted to one mode of proceeding, and in adopting either, should be considered as having made his election?

principles and judicial precedents, possesses great and splendid advantages, can no more be doubted, than that it is subject also to considerable defects.

The proofs of the latter position are far too manifest and too strong to be overborne, even by the authority *of [*clvii] Lord Coke himself, consummate master as he was of all the treasures of common law learning.

Nature's fancied impatience of a vacuum was not more complete than, according to Lord Coke, is the abhorrence of the common law from all that is inconvenient or unreasonable.

Nothing (he says) is lawful which is inconvenient; and, again, "the law, that is the perfection of reason, cannot suffer any thing that is inconvenient."

That Lord Coke should both feel and express that unbounded admiration of the common law, which was probably one main foundation of his excellence in that branch of learning, and which the very consciousness of that excellence in turn served to augment, cannot be matter either of regret or surprise (*m*); that such commendation *ought to be received with many [*clviii] grains of allowance, and that excessive panegyric, however agreeable to national prejudices, is injurious in proportion as it retards improvement, will not at the present day be disputed.

(*m*) 'This great master of the common law of his time, was never weary of reiterating his commendation of the law; he says 1 Ins. 97, b. "an argument drawn from an inconvenience, is forcible in law, as *hath been observed before, and shall be often hereafter*, nihil quod est inconveniens est licitum. And the law, that is the *perfection* of reason, cannot suffer any thing that is inconvenient."

Again, he observes, "Nihil quod est contra rationem est licitum. And this is another strong argument in law, nihil quod est contra rationem est licitum; for reason is the life of the law, nay, the common law itself is *nothing else but reason*, which is to be understood of an artificial perfection of reason, gotten by long study, observation, and experience, and not of every man's natural reason, for nemo nascitur artifex. This legal reason, *est summa ratio*. And therefore, if all the reason that is dispersed into so many several heads, were united into one, yet could he not make such a law as the law in England is; because by many successions of ages it hath beene fined and refined by an infinite number of grave and learned men, and by long experience growne to such a perfection for the government of this realme, as the old rule may be justly verified of it; neminem oportet esse sapientio rem egibus, no man out of his own private reason ought to be wiser than the law, which is the *perfection* of reason."

The common law, therefore, according to Lord Coke, is perfect reason, but to set up the reason of the best and wisest of men, as the standard of what is lawful, would be in fact to make individual discretion and reason the rule of right, which would be to dispense with all pretensions to certainty. What is meant, then, as indeed Lord Coke himself expresses it, is not "every man's natural reason," but artificial reason, derived from study and experience of the law. But as the natural reason of one man differs from that of another, so not only will one man derive a conclusion different from that of another, from the same legal data or precedents, but also in the application of the same legal or artificial rule to the same circumstances. Artificial or legal reason, therefore, so far from admitting of that unity, certainty, and perfection, to which natural reason cannot pretend, is subject to the like, and even in some respects greater uncertainty; it necessarily depends, in the first place, on the exercise of natural reason, and is, therefore liable to a double miscarriage, either in the failure to extract the true artificial or legal reason; or, 2ndly, in the failure to apply that reason properly, when once extracted; hence it is, that in the course of common law, many such miscarriages occur.

[*clix] *For the great and broad principles of natural justice, there is little necessity for resorting to precedent or example; they are written in plain characters in the minds of all rational men. It is in cases where such principles conflict with each other, or with extrinsic considerations of convenience, or where opposite suggestions of mere convenience or inconvenience are at variance with each other, that different minds will attain to very inconsistent, or even opposite conclusions.

The natural tendency of a system of unwritten law must be, in process of time, to induce an inconvenient degree of uncertainty arising from a struggle between precedent and principle, wherever they differ or are supposed to differ.

To overturn precedents by applying a rule of artificial policy and convenience inconsistent with them, would be to weaken the authority of precedent, one of the great pillars of the law; to adhere with servility to precedents, merely as such, would be to sacrifice to mere

precedent, those general principles of policy and convenience which constitute the very foundation of the system.

It is, however, no part of the author's intention, on the present occasion, to pursue these remarks. Enough may already have been said on the subject, to excite the attention of the student, and induce him to attend to the operation and effect of the common law principles, maxims, and practice on this branch of English jurisprudence.

In some instances, and those important ones, it will be found that rules have been established, on the mere foundation of precedent, as contradistinguished from any *considerations [*clx] of reason or convenience. Thus, so lately as the year 1812, the important question (*n*) was allowed to be mooted, whether the remedy by a civil action for damages ought to be allowed in respect of any calumnious expressions, when published in writing, which would not have been actionable had they been merely spoken. And upon that occasion the court, in pronouncing judgment, avowed that they were bound by mere precedent to establish a rule which was not supported by reason or convenience (*o*).

(*n*) It is probable that the extension of the remedy by action to matters, when written, which, when spoken would not have been actionable, was borrowed from the civil law, though it may be doubtful at what precise period the rule was imported into the law of England. Notwithstanding the celebrated *Nolumus Leges Angliæ mutari*, the lawyers of former times had it in their power, without avowing it, to introduce and establish many of the rules and maxims, and even much of the practice of the civil law. Bracton, professing to treat of the law of England, copies largely from the Institutes and Digest, and with so little anxiety to disguise the matter, as even to speak of the *Prætor's* authority and of the *Actio Legis Aquiliæ & injuriarum*. In treating of offences, in respect of which the offender was then liable in the same proceeding, both to a criminal and civil action, he says, *Facta puniuntur. . . scripta, ut falsa et libelli famosa*. Again, he says; *Actio competit ei que contumeliana vel injuriam passus est*.

(*o*) *Thorley v. Lord Kerry*, 4 Taunt. 355, and see the observation of Best, C. J. in the *Archbishop of Tuam v. Rolson*, 5 Bingh. 21. This branch of the law is subject no one defect, which is particularly to be deprecated. Whilst such ample provision is made for affording a remedy by action, in respect of every slander which can possibly affect a party in his profession, office, or means of living, so that the lowest mechanic has his remedy in damages, though none can be actually proved, against any one who detracts from his skill or ability, and no one can falsely say that a publican sells sour beer but he is responsible, yet can no action be maintained in respect of any oral imputation on the character or conduct of the most virtuous woman, how-

[*clxi] *Notwithstanding the difficulties which are incident to the common law system, the courts have endeavoured to protect individuals from injurious and calumnious imputations, without, at the same time, encouraging a spirit of vexatious litigation, and fettering the ordinary and daily intercourse of society with legal trammels. A remedy is afforded against all malicious attacks, which immediately tend to endanger the liberty of an individual, by imputing the commission of a crime, or to injure him in his profession, office, trade, or means of livelihood. On the other hand, no one is liable to an action for damages, so long as he has published that which is true, nor even although he has mistakenly and inadvertently published what turns out to be false, provided his error was an honest one, and the communication was fairly warranted by the occasion of making it.

The penal provisions of the law are founded on a few just and simple principles of criminal jurisprudence, by no means peculiar to this branch of the law. Here, as in other instances, freedom of action is the general rule, restraint the exception.

As the law inflicts punishment on any one who, without authority, imprisons or beats another, so is it penal, to assault or attack the character or credit of an individual, by written or printed libels, wantonly and maliciously published (*p*).

[*clxii] *Penal liability, in this, as in other instances, attaches only to an abuse of liberty, to the injury of the public. A man may publish what he will on all subjects of general interest; but if he wilfully and maliciously publish that which is offensive and pernicious, he commits the nuisance, as in any other cases, at the just peril of penal censures.

It may safely be asserted, that this portion of English jurispru-

ever groundless and malicious in its origin, or destructive in its consequences, unless some *actual temporal damage* can be proved.

(*p*) In confirmation of the general position, that the law of England, in respect of libel, is but an application of the general principles of penal jurisprudence to the particular subject matter, it may be remarked, that the only general and the most important statute relating to the subject was passed for the express purpose of removing an anomaly which had been introduced with respect to trials on prosecutions for libel, and placing them on the same footing with those for other misdemeanors.

dence is founded on just and equitable principles; that it is characterized by a spirit of moderation and liberality suited to the temper of the people and genius of the constitution, which has, in a great measure, confided to the people themselves, in their capacity of jurors, the guardianship of their own liberties, and that whilst no civilized nation has ever enjoyed a wider range of intellectual freedom, its value is enhanced by the reflection that the enjoyment of the privilege of free discussion is not merely consistent with public safety, but is greatly conducive to the moral and political interests of the community.

CHAPTER I.

THE provisions of the law of England in respect of communications, whether they be oral or written (*a*), which are injurious to individuals or to society at large, are those :—

1st. Of a civil nature, which give a remedy in damages to an injured individual ; or

2ndly. Of a criminal nature, which are devised for the security of the public.

The subject will first be considered in reference to the civil remedy, concerning which it will be convenient to inquire :—

1st. Under what limits the law awards a remedy in damages for such an injury.

2nd. The means of obtaining that remedy.

In general an action is maintainable in respect of every wrong or privation of a legal right.

*For it would be nugatory to pronounce that any man [*2] had a right, without affording him the means of enforcing or defending it.

By the same law, every man has a right not only to his life, limbs, health, and personal security, but also to his good name and reputation ; that is, he has a legal claim to be protected against

(*a*) It is necessary to observe, that, in order to avoid repetition, under the term *written*, are meant to be included all communications of whatever description, by writing, printing, painting, or signs, as contradistinguished from those which are merely oral.

false and wilful communications, whether oral or written, made to his prejudice or damage.

The law which recognizes this right also limits its extent.

This is done by defining what communications shall be regarded as *substantively injurious*, and therefore actionable, though no special damage or loss can be shown.

And by leaving all other cases to the operation of the general principle of law, that "Where a man has a temporal loss or damage by the wrong of another, he shall have an action on the case to be repaired in damages" (*b*).

For this general rule embraces all cases, where any *special damage* is immediately occasioned by a false communication, of noxious tendency.

It may be collected, from the definitions of text-writers and the decisions of our court, that, in general, an action lies to recover damages in respect of any false and *malicious* communication, *whether oral or written, to the damage of another in law or in fact.

It may, perhaps, be more properly stated, that an action lies in respect of any wilful communication, oral or written, to the damage of another, in law or in fact, made without lawful justification or excuse.

It will be seen that these descriptions do not differ in substance, and that if *malice* be used as a descriptive term, it must be understood of malice in a technical and artificial sense, as merely signifying the absence of any legal justification or excuse (*c*). [1]

(*b*) 1 Com. Dig. action on the case; Bac. Ab. tit. Action, B.

(*c*) See the objections on this subject in the Preliminary Discourse. The ordinary legal term by which an injury of the above description is denoted, is *Slander*; but to this term, different meanings have been attached. Its origin is the same with that of the word *Scandal*, being derived immediately from the old French word *Esclaunderie*, and mediately from the Greek *Σκάρδαλον*, offendiculum in viâ positum, a military instrument, used for the annoying of cavalry, by wounding the feet of the horses, and that again from *Σκαζω*, claudico. There is, therefore, nothing in the origin of the term, which should confine its figurative application to *oral*, as contradistinguished from *written* communications, although it has frequently been used in the former limited sense.

Sir W. Blackstone, in his enumeration, (vol. 3. p. 123,) of injuries, states,

*It is, however, obvious, that whatever be the brief, [*4]
general, and comprehensive form of words, used to de-

that those affecting a man's reputation or good name, are, first by malicious, scandalous, and slanderous words, tending to his damage and derogation ; as if a man maliciously and falsely utter any slander or false tale of another, &c. And the same learned writer, in subsequently describing the injury to a man's reputation by means of a libel, omits the term *slander* altogether.

But if not in common acceptance, yet in legal understanding at least, the word is used to embrace written as well as oral defamation ; thus, in Bacon's Abridgment, (tit. Slander,) *slander* is (defined to be) the publishing of words, in *writing* or by speaking, by means of which the person to whom they relate becomes liable to suffer some corporal punishment, or to sustain some damage.

In Comyns' Digest, (tit. Action upon the case for Defamation, A.,) it is laid down, that " An action on the case lies for defamation, if a man defame another by slanderous words " And afterwards the following hypothetical illustration is cited as an authority :—" If a man, by letter, *write* slander of another to a third person." 1 And. 119.

Again, in Buller's Nisi Prius 3. *slander* is defined to be " the defaming a man in his reputation, by speaking or *writing* words which affect his life, office, or trade ; or which tend to his loss of preferment in marriage or service, or to his disinheritance, or which occasion any other particular damage."

And, therefore, however desirable it might be to possess some legal term, which should signify *oral defamation* only, yet it would be inconvenient so to limit the term *slander* itself, in opposition to the authorities to the contrary ; the term will, therefore, be used in this treatise in its general sense, as comprehending *written* as well as *oral* defamation.

It seems also to admit of some doubt, whether the term *slander* necessarily imports the *falsity* of the matter communicated. According to Lord Camden, 2 Wils. 301. " If the words be true, they are *no slander*, and may be justified."

Sir W. Blackstone, in his description of the injury, (above cited,) uses the terms *false tale*, in context with, or rather in explanation of the word *slander*. And, in a subsequent passage, he observes, that " If the defendant be able to justify and prove the words to be true, no action will lie, even though special damage hath ensued, for then it is no *slander* or *false tale*." Bl. Comm. vol. 3. p. 125.

Again, the defamation of a peer is ordinarily termed *scandalum magnatum* ; and it seems to be clear, that the statutes which regard this offence relate to *false reports* only : the expressions are *false news* or tales, horrible and *false lies*, and other such *false things*. See below, tit. *Scandalum Magnatum*.

And it is observable that, in those statutes, the word *slander* itself is used, to denote rather the scandal, or offence occasioned by false news or tales, than the false news itself ; for they specify false news, &c., whereby discord, or occasion of discord, or *slander* may grow between the king and his people.

scribe the outlines of such an injury, a discussion of its different branches must quickly resolve itself into a consideration ;—

The term itself, therefore, seems to imply the *falsity* of the communication [a a] ; however this may be, as it is clear in point of law, that no action is maintainable where the communication is true, it is of little importance whether the term *false* be used as descriptive of the right to damages, or the truth be enumerated, as a ground of legal justification, the result and effect must be the same. It may, however, according to legal analogy, be more correct to consider the truth of a communication to be ground of collateral justification or excuse.

A man has either, by his own exertions, acquired a good character, or, at all events, the law will presume that he has one ; to the enjoyment of this he has the same natural and absolute right that he has to the enjoyment of his liberty, health, or property ; and any one who curtails his enjoyment of that reputation is *primâ facie*, as much a wrong doer, as if he deprived him of his liberty or property. It is true, that he forfeits his right to the enjoyment of a good reputation by misconduct, which shows that he no longer deserves it ; but he may also forfeit his right to liberty by misconduct—if, for instance, he commits a felony, any one has a right to arrest him : but, in the one instance, as well as the other, in the case of privation of character, as well as of liberty, the right to take away the reputation or liberty of another is founded on a collateral fact, namely ; his misconduct, and depends partly, at least, upon considerations of external legal policy and convenience. A man may have acquired a good character, as well as a good fortune, by unfair and fraudulent means, yet, being possessed of it, no stranger has a right, in law or in morals, to deprive him of either, unless it be for the attainment of some legal object, under the sanction of a law founded on principles of public convenience and utility.

The law of England recognizes this doctrine, in requiring that the truth of the imputation, if it be relied on by way of defence, shall be pleaded specially, by way of justification, (*vide infra*, tit. Justification ;) just as a defendant, in case of trespass to the person or property of another, must, in his defence, plead those collateral facts specially, which show that he was justified in what he did. This proves that the law regards such a justification as collateral. Were the falsity originally essential to the plaintiff's right to damages, then, although the proof of the truth would be incumbent on the defendant, for the plaintiff would not be put to prove a negative, more especially where the law presumed the affirmative, yet the defendant would be entitled to prove the truth of the charge under the general issue, for he would thereby show that an essential

[a a] Lord Ellenborough C. J., *Mailland v. Goldney*, 2 East. 426, observed, " In order to maintain this species of action it is necessary that there should be : 1. malice in the defendant ; 2. an injury to the plaintiff ; 3. that the words should be untrue."

*1st. Of the nature, quality, and consequences of the [*5] matter communicated.

2ndly. Of the act of communication.

ingredient in the plaintiff's claim to recover was wanting, and that he could not have been guilty of the injury imputed. For these reasons, it may be convenient to treat the truth of the alleged slander as a collateral ground of defence, within the words *without lawful justification or excuse*.

It may, however, be further remarked, that if, *ex vi termini*, the word *slander* imports a *false* charge, written slander cannot be used as co-extensive with *libel*, even in the application of the latter term to mere personal written defamation; for the term *libel* clearly extends to such written defamation, whether it be true or false.

Again, the term *libel*, (a mere diminutive from *liber*,) has by no means been used uniformly and constantly to convey the same meaning, even among lawyers, in its application to defamatory and illegal communications [*a a*.]

In Bacon's Abridgment, tit. Libel, it is defined to be "a *malicious* defamation, expressed either in printing or writing, or by signs, pictures, &c., tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and thereby exposing him to public hatred, contempt, and ridicule."

In Comyns' Digest, tit. Libel, A., a *libel* is defined to be a contumely or reproach, published to the defamation of the government, of a magistrate, or of a private person, and it may be in writing, 5 Co. 125. b. As if a man publishes a rhyme, epigram, or other writing, made to the defamation of another; or it may be without writing, (Salk. 418.) as if he makes a picture in an ignominious manner, or any ignominious sign, to the reproach of another, 5 Co. 125. b.

Hawkins, in his Pleas of the Crown, treating of *libel*, observes, "In a strict sense, it (a libel) is taken, for a malicious defamation, expressed either in print or writing; in a larger sense, the notion of libel may be applied to any defamation whatsoever, expressed either by signs or pictures, as by affixing up a gallows at a man's door, or by painting him in a shameful and ignominious manner."

Sir. W. Blackstone, in treating of libels as the means of civil injury; observes, "A second way of affecting a man's reputation is by printed or written libels, pictures, signs and the like, which set him in an odious or ridiculous light, and thereby diminish his reputation." (3 Comm. 125.)

In treating of the subject in a criminal point of view, he says, "Of a nature very similar to challenges are libels, *libelli famosi*, which, taken in their largest and most extensive sense, signify any writings, pictures, or the like, of an immoral or illegal tendency."

[*a a*] The term *Libel* in the English law is no doubt immediately derived (however differing from it in many essential particulars,) from the *Libellus Famosus* of the Roman Law.

3rdly. Of the intention with which that communication was made.

*4thly. The occasion and circumstances of the communication, as affording matter of justification or excuse.

First, then, as to the nature, quality, and consequences of the communication.

*It is, in the first place, essential to the claim to damages, that the imputation should be *false*; for as, in point of natural justice and equity, no one can possibly have any claim or *title to a false character, so also would it be contrary to the principles of public policy and convenience, to permit a man to make gain of *the loss of that reputation which he had forfeited by his misconduct (*d*).

But as the law always presumes in favour of innocence, and therefore does not require a plaintiff to prove the falsity of the

Of the definitions above referred to, none but those of Sir. W. Blackstone comprehend all that may be included under the term *libel*; and considering the offence in its relation as well to the public as to individuals, libels may not inconveniently or improperly be defined to be "any writings, pictures, or other signs, which immediately tend to injure the character of an individual, or to occasion mischief to the public."

[1] HAMILTON *arguendo* in the famous case of *The People v. Croswell*, 3 Johns. Cas. 354, after observing what had been remarked by Lord Camden, that he had not been able to find a satisfactory definition of a libel, said, that he would venture to submit a definition; and accordingly submitted the following: *A libel is a censorious or ridiculing writing, picture or sign, made with a mischievous and malicious intent towards government, magistrates or individuals.* This definition is spoken of by the court in *Steele v. Southwick*, 9 Johns. R. 215, as drawn with the utmost precision.

TILGHMAN, C. J. of *Pennsylvania*, defines a libel to be "any malicious printed slander which tends to expose a man to ridicule, contempt, hatred or degradation of character," 5 Binney, 340.

PARSONS, C. J. of *Massachusetts*, gives the following definition: "A libel is a malicious publication, expressed either in printing or writing, or by signs and pictures, tending either to blacken the memory of one dead, or the reputation of one who is alive, and expose him to public hatred, contempt and ridicule." 4 Mass. R. 168.

(*d*) See Preliminary Discourse, p. xxxii.

alleged calumny, and, on the contrary, imposes the burthen of proving the affirmative on the defendant; the truth of the supposed slander is, in effect, a ground of justification, which must be substantiated by the defendant, consequently the decisions on this point will be more properly considered hereafter, in remarking upon those justifications which are recognized by the law.

In the next place, the *consequence* of the slander must be to occasion some injury or loss to the plaintiff, either in *law* or in *fact*.

As, in many instances, the immediate tendency of malicious slander is, to produce great and irreparable mischief to the party whose character is assailed, though none can be proved, or can be proved in time, so as to save the sufferer from great loss, or even absolute ruin, the law, in particular instances, on grounds of the wisest policy, considers the very publication of particular slander

*to be injurious, and to confer a substantive right of action [*10]
tion; though no special loss or damage can be proved.

In the first place, then, in what cases does the communication amount to a damage in law? Or, in other words, when is the slander actionable without proof of any special damage?

The general rule is, that “where the natural consequence of the words is a damage; as if they import a charge of having been guilty of a crime; or of having a contagious distemper; or if they are prejudicial to a person in an office; or to a person of a profession or trade, they are in themselves actionable; in other cases, the party who brings an action for words, must show the damage which he has received from them” (*e*).

It appears, that an action may be maintained *without proof of special damage* in the following cases:

Where a person is charged with the commission of a *crime*.

Where an infectious disorder is imputed.

Where the *imputation affects him in his office, profession, or business*.

Where the matter charged tends to his *disinheritance*.

Where the slander is propagated by printing, writing, pictures, or signs.

[*11] *In cases of *scandalum magnatum*.

It will be considered, under each of these divisions, by what rules the extent of the action in each case is limited, and the reasons upon which they are founded.

1st. Where a person is charged with the commission of a crime.

Here it may be considered,

1st. *What must be the nature of the offence imputed.*

2ndly. *In what manner and terms it must be imputed.*

1st. What must be the nature of the offence imputed.

The action for scandalous words, though of high antiquity (*f*), was formerly so little resorted to, that between the first and fifth years of the reign of Edward the Third, not more than three instances occurred (*g*).

From the commencement of the reign of Elizabeth, such actions, especially for words containing an imputation of crime, began to multiply with great rapidity, a circumstance chiefly attributable to the increasing encouragement which they met with in our [*12] courts. No settled *rule, ascertaining their limits, seems however to have been established at any early period, and the mass of conflicting decisions to be met with in the books, exhibits convincing marks of the precarious and fluctuating principles on which they were grounded.

A struggle between two opposite inconveniences, seems to have created this wavering in the minds of the judges. The fear of encouraging a spirit of idle and vexatious (*h*) litigation, by affording too great a facility to this species of action, was contrasted with the mischief resulting to the public peace from refusing legal redress to the party whose reputation had been slandered, every day's experience teaching that the remedy, denied by our courts, would most surely be pursued by acts of personal violence. Accordingly it appears, that as the former or latter of these considerations preponder-

(*f*) By the st. 13 Ed. 1. it is recited, that in cause of defamation, it hath been granted already that it shall be tried in a spiritual court, where *money is not demanded*.

(*g*) According to Coke, C. J., 3 Bulst. 167.

(*h*) 6 Mod. 24.

ated, a more rigid or relaxed rule of decision was adopted by the judges (i).

In *Edward's* case (k) the defendant had charged the *plaintiff with having attempted to burn the defendant's [*13] house; and the court were of opinion that the charge was actionable, assigning, generally, as the reason, that "*by such speech the plaintiff's good name is impaired.*"

In *Stanhope v. Blith* (l), the words were, "M. Stanhope hath but one manor, and that he hath gotten by swearing and forswearing;" and Wray, C. J. said, "that though slanders and false imputations are to be suppressed, because many times '*a verbis ad verbera perventum est*;' yet" he said, "that the judges had resolved, that actions for scandals should not be maintained by any strained construction or argument, nor any favour given to support them; forasmuch as in these days they more abound than in times past, and the intemperance and malice of men increase, *et malitiis hominum est obviandum*: and in our books *actiones pro scandalis sunt rarissimæ*; and such as are brought are for words of *eminent slanders and of great import.*" In *Smale v. Hammon* (m), the words were, "thou wert forsworn, and I can prove it." Upon motion in arrest of judgment, Williams, J. said, "this rule is to be observed as touching words, which are actionable; that is to say, *where the words spoken do tend to the infamy, discredit, or* [*14] *disgrace of the party, there the words shall be actionable.*" And the rule was affirmed by the court.

Yet so little was this rule regarded, that in the very next case which occurred, where the words were (n) "thou wert in gaol for robbing such an one on the highway," the court differed in opinion; and Fenner, J. held, that if one saith of another, "thou art as very a thief as any in Warwick Gaol," *none being then in prison*, the

(i) Out of 200 successive cases, taken at random in Croke's Reports of cases in the reign of Elizabeth, 15 consist of actions for words,—a proportion somewhat greater than that of one in fourteen. If, upon the average, it be supposed that each individual case of the two classes occupied the same time, it will follow, that one day out of every fourteen, must have been devoted by the court to this fruitful subject of litigation.

(k) Cro. Eliz. 6.

(l) 4 Co. 15.

(m) 1 Bulst. 40.

(n) Bulst. 40.

words would not be actionable, but otherwise *had a felon been there at the time.*

In *Sir Harbert Crofts v. Brown* (o), the words were, "Sir II. C. keepeth men to rob me." And upon giving judgment for the defendant, Coke, C. J. said, "We will not give more favour unto actions on the case for words, than of necessity we ought to do, where the words are not apparently scandalous, these actions being now too frequent."

In the early part of the reign of Queen Anne, Chief Justice Holt (p) observed, that "*it was not worth while to be learned on the subject, but whenever any words tended to take away a man's reputation, he would encourage actions for them, because* [*15] *so doing would much contribute to the *preservation of the peace.*" And in another report (q) of the same case, he is stated to have said, "I remember a story, told by Mr. Justice Twisden, of a man that had brought an action for scandalous words spoken of him; and upon a motion made in arrest of judgment, the judgment was arrested, and the plaintiff being in the court at the time, said, that if he had thought he should not have recovered, he would have cut the defendant's throat."

Yet the same learned judge, in a case (r) somewhat subsequent to the former, is reported to have said, that "to make words actionable in themselves, it is necessary *to charge some scandalous crime by them.*" In the case of *Oyden and Turner* (s), the defendant said to the plaintiff, "thou art one of those that stole my Lord Shaftesbury's deer." The court held, "that words to be of themselves actionable, without regard to the person or foreign help, must *either endanger the party's life, or subject him to infamous punishment, and that it is not sufficient that the party may be fined and imprisoned*: for that, if any one be found guilty of any common trespass, he shall be fined and imprisoned, and *yet, that [*16] no one will assert that to say one has committed a trespass will bear an action, or that at least the thing charged upon the plaintiff must be *scandalous.*" And in the

(o) 3 Bulst. 167. (p) *Baker v. Pierce*, Holt, 654; 6 Mod. 24. S. C.

(q) Lord Raym. 959. (r) *Walmesley v. Russel*, 6 Mod. 200.

(s) 6 Mod. 104; 2 Salk. 696; Holt, 40.

same case it was held, that where the penalty for an offence by a statute was of a pecuniary nature, an imputation of such an offence would not be actionable, even though in default of payment, the statute should direct the offender to be set in the pillory was only for want of money, and not the direct penalty given by the statute.

In *Button v. Heyward* (t), Fortescue Justice observed, "It was the rule of Holt, C. J. to make words actionable *whenever they sound to the disreputation of the person of whom they were spoken*; and this was also *Hale's* and *Twisden's* rule, and I think it a very good rule."

Such is the nature of the general rules upon which the older decisions were founded.

The ground of an action for words in *the absence of specific damage*, is, as has been seen, the *immediate tendency in the words themselves to produce damage to the person of whom they are spoken, in which case, presumption supplies the place of actual proof*. The immediate and obvious inconveniences resulting from a **charge of crime are, the party's degradation in society, and his exposure to criminal liability*. In the former case, the presumption is, that he has lost the benefit of intercourse with society; in the latter, that he is placed in jeopardy, and that the suspicion excited by the report, may produce a temporary deprivation of his liberty until his innocence can be made manifest (u). Further than the evil of a temporary privation, the presumption cannot in general be carried, since a *mere false report cannot of itself affect the party's life*; and *if the report be true, he is not, as will afterwards be seen, entitled to an action*. Cases may however occur, where the detriment may be much more serious than a temporary loss of liberty. It is very possible to suppose, for instance, that an unfortunate combination of circumstances may leave the question of guilt or innocence, in a capital case, so nicely poised in the mind of the jury, that a prejudice instilled by a previous report, may turn the scale against the accused, though really innocent; and this

(t) 8 Mod. 24.

(u) The being of *bad fame*, or keeping company with persons of scandalous reputation, was formerly a reason for commitment. Haw. b. 2. c. 12. p. 8, 9, 10, 11.

apprehension was still more formidable, when the law required a man's jury to be summoned from the *neighborhood*, a place likely to be the most strongly infected with the prejudice. He

[*18] *might also be deprived, by means of such slander, of the benefit of general evidence as to his character (*v*).

The liberty of every individual is considered by the law to be so valuable, that the very probability of its suspension is held sufficient to enable him to assert his innocence in court, to avert the evil apprehended, and to recover damages for the injury at the very earliest opportunity.

Since then the grounds of action are to be found in one or both these consequences, namely, the degradation of the party in society, or his liability to criminal animadversion, it becomes material to ascertain, by reference to the decided cases, under what restrictions one or both of these can constitute the foundation of such an action. First, it is to be observed, that though these two consequences cannot be completely separated, inasmuch as a greater or less degree of discredit must necessarily attach to every violation of the existing law, yet that *the party's jeopardy, in a legal point of view, is regarded by the law as the principal ground of action* [1]. This

appears from the general scope and tendency of the body
[*19] of cases, to be found in the books *relating to this copious subject, in which, though the discredit to the party is frequently a topic of discussion, yet the main question, for the most part, turns upon the penal consequences of the offence, and the certainty wherewith it is charged.

There are, however, many instances to be found, which prove, that criminal liability is not always the peculiar and exclusive ground of action, and in which a remedy has been given on account of imputations, which if believed and even proved, could not have subjected the plaintiff to any future penalty:—for instance,

The defendant said, “Robert Carpenter (*w*) was in Winchester

(*v*) And as previous character is usually taken into consideration in diminution of punishment, when it is discretionary, even a guilty person may be seriously injured by false reports to his prejudice.

(*w*) *Carpenter v. Tarrant*, Rep. Temp. Hard. 339; see also *Cuddington v. Wilkins*, Hob. 81.

[1] See note [1], page 43, *infra*.

Goal, and tried for his life, and would have been hanged had it not been for Leggat, for breaking open the granary of farmer A. and stealing his bacon.”

In (*x*) *Gainford v. Tuke*, the words were—“Thou wast in Launceston Gaol for coining!” The plaintiff replied, “If I was there, I answered it well.” “Yea,” said the defendant, “you were burnt in the hand for it!”

In *Boston v. Tatham* (*y*), the action was brought for saying that the plaintiff was a thief, and had stolen the defendant’s gold. It was contended, *in arrest of judgment, that [*20] the words not being certain as to time, they might be taken to refer to the time of Queen Elizabeth, since which there had been divers general pardons, in which case no loss could happen from the scandal. But the court said, that it is a great slander, to be once a thief; and that although a pardon may discharge of punishment, yet the scandal of the offence remains.

In the above cases of *Carpenter v. Tarrant* and *Gainford v. Tuke*, (the former of which was cited by Lord Ellenborough, C. J. in giving judgment in a late case) (*z*), the words import, that the plaintiff had been acquitted in the one case, and punished in the other; neither imputation, therefore, though believed, could have exposed either of the plaintiffs to future liability. In these and similar instances, it is likewise to be observed, that though motions were made in arrest of judgment, the objection relied upon was, that the words contained no direct charge of felony; and it was not insisted upon as essential to the action, that the words must impute an offence which may expose the party to a future prosecution, though there was room in each of these cases for making the objection, had it been thought available. And in the case of *Boston v. Tatham*, the court expressed an opinion that even allowing *that the words fixed the offence to a period, [*21] since which the liability to punishment must have been discharged by a general pardon, yet that the words were actionable

(*x*) Cro. Jac. 536.

(*y*) Cro. J. 622. Vid. Sty. 49. All. 35. 1 Vin. Ab. 415. pl. 8.

(*z*) *Roberts v. Camden*, 9 East. Rep. 63.

since the scandal of the offence remained. And although in these cases the principal ground upon which words of this description are held to be actionable seems to have been abandoned, yet the good sense of the decisions is obvious; for were it otherwise, the slanderer might always secure impunity by cautiously asserting that the party slandered had already suffered the punishment appertaining to the imputed offence [1].

[1] The principle of the three last cited cases is recognized in *Van Ankin v. Westfall*, 14 Johns. R. 233, where it was said by the court in denying a new trial in an action of slander, "the right of the plaintiff to sustain the action, does not depend upon the question whether he is *liable to be prosecuted and punished* for the crime charged against him: as when the *statute of limitations* has run against the criminal prosecution, it is still slander to charge the party with the offence." The same principle was acted upon in *Fowler v. Dowdney*, 2 Moody & Rob. 119, which was an action of slander for saying of the plaintiff "he is a returned convict." It was held that the words were actionable, imputing an offence punishable by transportation; and though the punishment had been suffered, the obloquy remained. It seems however that in such a case the defendant may justify, *Baum v. Clause*, 5 Hill, 196. See also 5 Penn. R. 372.

Whether words are *actionable* in themselves, depends not always upon the mode of expression adopted by the speaker; it frequently depends upon the sense in which they are understood by the hearers. If understood to impute a crime, it is immaterial how vague and doubtful they are. Even words, innocent on their face, may be intended and understood in a calumnious sense. Words accompanying a slanderous charge, showing the impossibility of the party calumniated being subjected to an indictment or to an infamous punishment for the crime imputed, may be a mere *ruse* to evade the vigilance of the law. Whether they be so or not, is a proper question for a jury. Management of this kind, laying an anchor to the windward for a future day, is unavailing. *Hunt v. Algar*, 6 Carr. & Payne 245, was an action for a libel copied by the defendant from one newspaper into another, with the sole addition of the word FUDGE. The cause was tried before Lord LYNTHURST, who submitted to the jury the question whether it was the object of the defendant by the addition of that word to vindicate the character of the plaintiff; or whether it was introduced merely for the purpose of creating an argument in his favour in case proceedings should subsequently be had against him; and instructed them that if the word was added only for the latter purpose, it would not take away the effect of the libel. If on trial of the cause the defendant can show that the party to whom the crime was imputed, had in fact been guilty of such crime, he may justify, although at the time of the speaking of the words, the plaintiff was no longer liable to indictment or punishment; otherwise the jury will be warranted to conclude that the whole of what was said by the defendant is false, and of course will find a verdict for the plaintiff.

Supposing it, however, to be perfectly true, that in some instances the presumption of prejudice to the plaintiff in society is a ground of action, independent of any detriment in a criminal point of view, yet it appears to be clearly established, that “*No charge upon the plaintiff, however foul, will be actionable without special damage, unless it be of an offence punishable in a temporal court of criminal jurisdiction.*”

Thus, by a long series of cases it has been decided, that to say a man is “*forsworn (a),*” or “*that he has* [*22] taken a false oath, generally, and without reference to some judicial proceeding, is not actionable ; and the reason is, that in the latter case a perjury is charged, for which, were the charge true, the party would be liable to be indicted and punished ; in the other, no more than a breach of morality is imputed, of which the law does not take cognizance [1].

So, to accuse another of having secreted (*b*) a will, for the purpose of defrauding his relations, is not actionable : though a person, who by such means possesses himself of the testator’s property, would be regarded by society in no better light than the stealer of an horse, or the picker of a pocket. Again, where, in general, bad principles and vicious propensities are imputed to the plaintiff, he is not entitled to any compensation in damages without proof of a specific loss ; though a person known to possess such principles and propensities is as likely to be despised and avoided in society as if he had actually reduced them into practice.

The defendant (*c*) said of the plaintiff, “*He is a brabbler and a quarreller, for he gave his champion council to make a deed of gift of his goods to kill me, and then to fly out of the country ; but God preserved me.*”

(*a*) Mo. 365. Cro. Eliz. 429 ; Popham 210. Ow. 62. Cro. Eliz. 135. 609. 720. 788. 1 Vin. Ab. 404. 1 Rol. Ab. 40. Com. Dig. tit. Action on the case for defamation, D. 7. 6 Mod. 200.

(*b*) 3 Salk. 327.

(*c*) *Eaton v. Allen*, 4 Rep. 16. Cro. Eliz. 684. ‘

[1] See decision recognizing this principle, *Hopkins v Beedle*, 1 Caines 347 and note. See also *Stafford v. Green*, 1 Johns. R. 505 ; *Ward v. Clark*, 2 Id. 10 ; *Watson v. Hampton*, 2 Bibb’s R. 319, and *Jacobs v. Fyler*, 3 Hill 572.

[*23] "Sir E. Coke (*d*), in his comment upon this case, says, "Upon great consideration and advisement, it was adjudged that the words in the principal case were not actionable; for (he adds) *the purpose or intent of a man, without act, is not punishable by law.*" And this rule seems in all times to have been adhered to with more consistency than is generally observable in decisions relating to this branch of the law, though many cases have been deemed to fall within the rule, where the words plainly imported an act done.

Thus, in the very case of *Eaton and Allen* above cited, there was more than a mere intention to procure the commission of a murder; there was a solicitation to commit one, which is of itself an indictable offence.

In *Lewknor (e) v. Cruchley*, the words were, "He and another, knowing that J. S., a goldsmith, did carry with him a great deal of plate, did lie in wait to rob him, and set upon him by the highway; but he raising the country, they did fly away, and Lewknor lost his horse, and they both were driven to ride away upon one horse."

It was contended in arrest of judgment, that by the plaintiff's own showing, no felony was charged upon him, but nothing more than a mere intent; but the court were of opinion, that the action well lay, for that not only an *intent*, but a *fact* was charged, for which fine and imprisonment were due.

The cases are so uniform upon this point, that it would be superfluous to cite further instances to show that, for an imputation of evil inclinations or principles, no action lies; unless, indeed, as will afterwards be considered, it affect the plaintiff in some particular character, or produce special damage. -

And so general terms of abuse, expressive of evil inclinations and corrupt manners, as rogue (*f*), rascal, scoundrel, and the like, are not actionable, for they do not impute any precise and definite offence punishable in the temporal courts. *So it has been said, that the*

(*d*) 4 Co. 16. pl. 10; and see Lord Ellenborough's dictum, 4 Esp. C. 219.

(*e*) Cro. Car. 140.

(*f*) 3 Bl. C. 124. 1 Vin. Ab. 417.

word swindler is too general to support an action, but Mr. J. Aston formerly held otherwise (*g*). [1]

In the case of *Junas v. Herne* (*h*), C. J. Willes said, that if it were now *res integra* he should hold, that calling a man a rogue, or a woman a whore, in public company, was actionable.

It seem also to be clearly established, that words imputing an offence (*i*), merely spiritual, are not in themselves actionable; and the reason assigned for this is (*k*), that [*25] the person slandered may, for such words, institute a suit in the spiritual court; and that if an action were to be entertained in a temporal court, the party would be twice punished for the same words. Whatever merit this reason may possess, the rule itself seems to be fully established, that where oral defamation concerns matter merely spiritual, and determinable in the ecclesiastical court, as if it impute adultery, fornication, or heresy, it is no ground of action at common law.

The power of the spiritual court is, however, confined to the infliction of penance *pro salute anime*, and does not extend (*l*) to the awarding damages or amends to the injured party.

In the particular class of cases where acts or habits of incontinence have been imputed to females, much doubt has been entertained, whether an action was maintainable: these, however, will be hereafter considered under a more appropriate division of the subject, since it seems both from actual decision and analogy, that such imputations cannot in general be considered actionable as charging a temporal crime (*m*).

In *Barnabas* (*n*) *v. Traunter*, the plaintiff declared that he was a parishioner of S., and that the defendant [*26] being vicar there, with the intent to scandalize the plaintiff, and to draw an ill opinion of him among his neighbors, and to exclude him from the church, and to deprive him of all the benefit

(*g*) 1 T. R. 753.

(*h*) 2 Will. 87.

(*i*) 4 Co. 20.

(*k*) Salk. 694. 12 Mod. 106.

(*l*) 4 Co. 20.

(*m*) 1 Vin. Ab. 392. Cro. J. 323. 473. Poph. 36.

(*n*) 1 Vin. Ab. 396.

[1] It is not actionable to call a party a *swindler*. See *Savile v. Jardine*, 2 H. Black. 531; *Stevenson v. Hayden*, 2 Mass. R. 406; and *Chase v. Whitlock*, 3 Hill 139.

of hearing divine service in the said church ; in the time of divine service, in the hearing of parishioners, maliciously pronounced the plaintiff excommunicated, and further refused to celebrate divine service till the plaintiff departed out of the church ; upon which the plaintiff was compelled to go out of the church ; whereas the plaintiff was not excommunicated ; by which means the plaintiff was scandalized and hindered of hearing divine service for a long time ; and for the clearing of this scandal and showing his innocency therein, was put to great *trouble and expense*. And the action was held to be maintainable, though the plaintiff did not show that any man avoided his company, or forebore to trade or deal with him, or that he had any temporal or special loss ; for it was said, this is a great and malicious scandal, though to his soul and though spiritual.

Though scandal to the soul, was the reason assigned for allowing the plaintiff to recover in this instance, the case itself can scarcely be considered as an exception to the general rule ; for, [*27] though a charge of excommunication supposes *nothing more than a spiritual offence or contempt upon which it is grounded, an imputation of which offence would not be actionable, and although the deprivations of the spiritual benefits complained of cannot be considered as a temporal loss ; yet, excommunication itself is attended with many serious temporal inconveniences : the object of it is excluded from the society of all Christians ; is disabled to do any act that is required to be done by one that is *probus et legalis homo* ; he cannot serve upon juries ; cannot be a witness in any court ; and, which is still more serious, he cannot bring an action, real or personal, to recover lands or money due to him (*o*). He is further liable to the writ (*p*) *de excommunicato capiendo*, by which the sheriff is directed to take the offender and imprison him in the county goal, till he is reconciled to the church. On the ground of these temporal deprivations under which a person excommunicated labours, as well as of his having been put to *expense*, the above case may perhaps be considered as authority, consistently with the general rule.

The rule itself is liable to so little doubt that it would be losing

(*o*) Litt. 201.

(*p*) Fitz. N. B. 62.

time to cite cases in support of it, otherwise than by way of general reference (*q*),—one instance may suffice.

*The defendant (*r*) said that the plaintiff “had two [*28] bastards, and should have kept them ;” by reason of which, words and discord arose between the plaintiff and his wife, and they were likely to have been divorced. After verdict it was moved, in arrest of judgment, that these words were not actionable, because he doth not show any temporal loss, as loss of marriage, or the like ; but this imagination to be divorced is not to any purpose, and it is but a causeless fear ; and of that opinion was all the court.

But where the words impute an offence for which, though of *spiritual cognizance*, the plaintiff is liable to *punishment in a temporal court*, they are actionable.

So that to impute incontinency to a female in London is actionable, because by the custom of the city, she is liable to be carted for her offence (*s*).

So the calling a woman, living in the borough of Southwark, “whore,” is actionable (*t*), because she is liable to public carting by prescription [1].

So, to say that a man is the father of a bastard, is not actionable unless it be alleged of a bastard likely to become chargeable to the parish, for *otherwise he is not liable to the [*29] penalties of the statute (*u*) of Elizabeth.

(*q*) 1 Vin. Ab. 392.

(*r*) Cr. J. 473.

(*s*) 12 Mod. 106. Holt. R. 40. 1 Vin. Ab. 395.

(*t*) Keb. 418. Sid. 97. 1 Vin. Ab. 395.

(*u*) *Salter v. Brown*, 1 Vin. Ab. 397. Cro. Car. 436.

[1] Words charging a married woman with adultery are not *per se* actionable ; so held by the Supreme Court of NEW-YORK, in *Buys and wife v. Gillespie*, 2 Johns. R. 115 ; nor will an action lie for calling a woman a common prostitute, *Brooker v. Coffin*, 5 Johns. R. 133. In SOUTH CAROLINA, words charging a woman with want of chastity are held not to be actionable, 2 Nott & McCord 204 ; and so in KENTUCKY, *Elliot v. Ailsbury*, 2 Bibb 473 ; whilst in NEW JERSEY they are held actionable for the reason unavailingly urged in *Buys and wife v. Gillespie*, viz : that there is no *ecclesiastical court* to which the aggrieved party can resort for redress, *Smith v. Minor*, 1 Cox's R. 16. In CONNECTICUT, words imputing incontinence to a female are made actionable by statute, 2 Conn. R. 707 ; and so in PENNSYLVANIA, 2 Binney 34, 3 Serg. & Rawle 261.

So, to accuse another of fornication was held to be actionable, whilst the statute making it a temporal offence was in force (c).

Although the action itself be limited to cases where the offence charged is defined by law, yet, as has been shown, the placing the party in jeopardy is not the exclusive ground of action. It may be asked then, as the loss in some cases consists solely in the prejudice to the plaintiff's character in society, without any regard to his being endangered in law, how happens it that the extent of the action is confined by the former of these circumstances, and is not co-extensive with the latter? The answer seems to be, that though the presumption of prejudice to the plaintiff's character in society is frequently the most serious ground of complaint, yet that such prejudice does not in itself furnish a rule sufficiently clear to determine the extent of the action. Whence it becomes necessary to adopt some other boundary, which though not exactly commensurate with the injury to be remedied, may, from the greater certainty and facility with which it can be applied, conduce in the main to the public good.

[*30] "To say that a man is a bad father, husband, or son, that he is a drunkard or liar, or charge him with want of veracity in a single instance, must, if the imputation be believed, induce a worse opinion to be entertained of him; and must therefore be considered as a real detriment to an innocent party. If then discredit alone were to be adopted as the criterion, the action would extend to every degree of discredit; a rule highly inexpedient, both on account of the endless litigation which it would produce, and of the other incident mischiefs which have been already touched upon; but if it be admitted, upon the principle of expediency, that some limitation be necessary, perhaps none could be adopted more convenient than the one recognized by the law, which confines the action to imputations of offences punishable in the temporal courts. The rule itself has the advantage of clearness and certainty in its operation, and is nearly co-extensive with our criminal code; and it is to be remembered, that where imputations do not fall within its scope, yet any specific damage accruing to the party in confidence of them, will entitle him to a remedy.

The action then is confined to cases where an offence is charged punishable in the temporal courts ; it is next to be considered whether the action extends to *all* or to *what portion* of these.

“There may be some impropriety in supposing that a [*31] violation of any existing law is not in some degree discreditable ; for although the long catalogue of crimes, defined in our penal code, exhibits guilt in an almost infinite variety of shades ; yet still the most trivial offender cannot in strictness be deemed wholly exempt from blame.

In many instances, however, the discredit attaching to the commission of the offence charged, is so minute, that it can scarcely be considered as the ground of action.

In this, therefore, and many other similar cases, the actionable quality of the words results not from the degree of discredit attached to the party, but to the penal nature of the offence imputed (a).

The defendant said, “thou hast harbored and received thy son into thy house, knowing before, that he was a [*32] seminary priest (b).” It was held, that the words were scandalous and actionable, the offence having been made felony by statute (c). Yet it can scarcely be presumed, that in this case the imputation could seriously injure the father’s character in society, and consequently the remedy was given because the words endangered him in law.

The books abound with cases which prove, that a charge of TREASON, or any species of FELONY, whether it existed at Common Law or was so constituted by statute, has always been considered as actionable : to these may be added that of PERJURY, which in its very nature tends to destroy the plaintiff’s credit in society ; the

(a) The distinction between that which is *malum prohibitum* and *malum in se* has been frequently denied by great authorities. It seems indeed to be impossible to contend that any wilful violation of the existing law is not more or less immoral. Every legal prohibition must be presumed to be a beneficial one to society, and whoever voluntarily offends against it, takes upon himself to substitute his own judgment in the place of that of the supreme legislative authority of the state. Such a practice, if general, would obviously be inexpedient, and therefore immoral, inasmuch as it would inevitably lead to frequent violations of the existing law.

(b) *Smith v. Flynt*, Cr. J. 300.

(c) 27 Eliz. c. 2.

courts have, however, gone beyond this, and imputations of many other misdemeanors have given rise to a numerous class of decisions.

In *Stone v. Smalcombe* (*d*), the defendant having been arrested under a warrant made upon a latitat, said, "this is a counterfeit warrant, made by Mr. Stone (the plaintiff;)" and though it was alleged for the defendant in arrest of judgment, that forging a warrant was not a forging within the statute of Elizabeth, the court held, that the words were actionable [1].

*So in many cases the charging a mere solicitation or [*33] attempt to commit a felony has been held to be actionable. In *Lady Cockaine's* case (*e*), the words were—"my Lady Cockaine did offer two shillings to a woman with child to get her a drink to kill her child, because it was gotten by J. S., Sir Thomas Cockaine's butler." And it was moved, that an action did not lie for the words; but it was adjudged for the plaintiff, for by them it was said, the lady's credit is impaired; and, if true, there was *cause to bind her to her good behaviour*, although it was not said, that she did give money, or that any hurt was done.

So in *Tibbott v Haynes* (*f*), the defendant said, "Tibbott, and one Gough, agreed to have hired a man to kill me, and that Gough should show me to the hired man to kill me." Upon motion in arrest of judgment, J. Gawdy was of opinion, that the words were not actionable, because it was not alleged that any act was done by the plaintiff, nor any thing put in use by him, but only a communication between him and Gough; and that it would have been otherwise had the defendant said, "he hired a man to kill me." But Wray and Fenner, justices, were of a different opinion, and judgment was given for the plaintiff. In *Cardinal's* (*g*) [*34] case, "the words were,—“If I had consented to Mr. Cardinal, J. H. had not been alive.”—And the plaintiff had judgment. In the case of *Eaton v. Allen* (*h*) above

(*d*) Cr. J. 648.

(*e*) Cro. Eliz. 49.

(*f*) Ibid. 191.

(*g*) 4 Co. 16.

(*h*) 4 Co. 16. Cro. Eliz. 684.

[1] In *Alexander v. Alexander*, 9 Wendell 141, a charge that the plaintiff had forged the defendant's name to a petition presented to the legislature was held actionable, although it imputed an offence of no higher grade than a *misdemeanor*.

cited, the words were, "He is a brabblor and a quarrellor, for he gave his champion council to make a deed of gift of his goods to kill me, and then to fly out of the country, but God preserved me:" and though the former cases were cited, judgment was arrested, and the reason given in the report in Croke is, "that the first words, 'he is a brabblor, &c.' are not actionable; and that the latter words, commencing with 'for,' did not contain any express affirmation." But Lord Coke observes, "that it was adjudged in this case upon great consideration and advisement, that the words were not actionable because the purpose and intent of a man, without act, is not punishable by law;" this reason is, however, defective, for solicitation is in itself an act; and this case was overruled in the subsequent one of *Lewknor v. Crutchley* (i).

The defendant there charged the plaintiff with having "set upon a goldsmith in the highway with intent to rob him." It was contended in arrest of judgment, that no felony was charged, but a mere misdemeanor [1]; and the case of *Eaton v. Allen* was cited; but the court delivered their *opinions *seri-* [*35] *atim*, that the action lay, and said, "that although the defendant charged him with an act that is not felony, yet he chargeth him not only with the intention, but with a fact, which is as near to felony as may be, and with such an offence as is more than intent only, and more than riot, and for which fine and imprisonment are due." And Jones, J. cited *Wicks's* case, where the defendant said, "nine persons set upon me to have robbed me and you (Wicks) was one of them; and it was adjudged that the action lay.

If any distinction can be made between the two last cases (k), it consists in this; that in the former there was a solicitation only, to commit felony; in the latter there was an overt act exercised in

(i) Cro. Car. 140.

(k) i. e. *Eaton v. Allen*, and *Lewknor v. Crutchley*.

[1] In *Young v. Miller*, 3 Hill 21, it was held that an action lies for words imputing a *misdemeanor* involving moral turpitude, and subjecting the party to an indictment. The words were, "You have removed my land-mark." The removal of land-marks being declared by statute a misdemeanor, subject to fine and imprisonment in a county jail. See also *Alexander v. Alexander*, 9 Wendell 141, and *ante* page 29, n. [1].

pursuance of a felonious intention. Such a distinction is at all events now no longer available, since it is clear that a solicitation to commit felony constitutes a misdemeanor (*l*).

So where the charge is of a misdemeanor not at all connected with felony.

During an election of members (*m*) to serve in parliament, the defendant, holding up money in his hand, said of the plaintiff, who was a candidate, "these guineas are Mr. Bendish's (the [*36] *plaintiff's) money, and were given me to vote for him; he has bought my vote, and he shall have it." It was contended, in arrest of judgment, that no words are actionable unless they subject the plaintiff to a temporal punishment, and that nothing had been said that could subject the plaintiff to an indictment on the statute; but Holt, C. J. was clearly of opinion, that the action lay, and judgment was given for the plaintiff. It is to be remarked, that bribery was an offence at Common Law (*n*), and punishable by indictment or information.

Where a commission had been awarded (*o*) out of Chancery, to the plaintiff and three others, with the assent of the parties to a suit, to examine witnesses, and to hear and determine, the defendant, who was one of the parties (said of the plaintiff), "Sir George Moor is a corrupt man, and hath taken bribes of Richard King (the other party to the suit);" and likewise further said, "Richard King hath set Sir George Moor on horseback, with his bribes, to pervert justice and equity." Upon motion in arrest of judgment, the court said, "that the plaintiff having the King's commission to execute, if he take bribes to execute it, it is a breach of [*37] the trust reposed *in him, and is so great an offence, that he may be indicted and fined at the Common Law;" and the plaintiff had judgment.

To charge a person with having given a sum of money to the commissioners to be made purser of a man of war, was held actionable; such an offence being a corruption of a public trust, and a crime both in the commissioners and the person tempting them, and

(*l*) 2 East, 6.

(*m*) *Bendish v. Lindsay*, 11 Mod. 194.

(*n*) Burr. 1335, 1359.

(*o*) *Sir George Moor v. Foster*, Cro. J. 65.

the words therefore actionable, as imputing a criminal charge (*p*).
[1]

In the case of *Sir William Russell v. Ligon* (*q*) it was adjudged and agreed, that an action lies for charging the plaintiff with being the author of a libel, though the making a libel is not an offence which concerns life or member, but punishable only by fine and by imprisonment in the Star Chamber, or upon an indictment at Common Law. In the principal case, it seems, however, to have been averred in the declaration, that the plaintiff was a justice of the peace [2].

So to say, a person keeps a bawdy house, is actionable, because the offence is indictable; [3] and though it has been held, that such words are not actionable, the reason on which the judgment was given is bad, for it was assumed (*r*), that *the [*38] offence was not indictable at Common Law.

So to accuse a person of subornation of perjury (*s*). [4]

So the charging another with receiving goods, knowing them to be stolen, was actionable, whilst the offence remained a mere misdemeanor, and punishable by fine and imprisonment at Common Law.

For though it was held in the case of *Dawes* (*t*) *v. Bolton*, that for the words "Thou art a knave, and hast received stolen swine; and hast received a stolen cow; and thou knowest they were stolen!" no action lay. Yet the ground of decision was, that the words were to be considered in *mitiori sensu*; and that it might be, that the defendant meant that the plaintiff had received them as bailiff or lord of a manor, who had liberty to have waif's and felon's goods; and

(*p*) *Purdy v. Stacey*, Burr. 2698.

(*q*) 1 Vin. Ab. 423. pl. 27. 1 Com. Dig. tit. Action on the case for defamation 8, 9. 1 Roll. Ab. 46.

(*r*) Cro. Eliz. 643. sed vid 1 Roll. 44. 1 Buls. 138. (*s*) Cro. J. 158.

(*t*) Cro. Eliz. 888.

[1] In *Lindsey v. Smith*, 7 Johns. R. 359, it was held that words charging a justice of the peace with being bribed are actionable; and in *Chipman v. Cook*, 2 Tyler 456, where a public prosecutor was charged with corruption, an action was held to lie.

[2] In *Andreas and wife v. Koppenhefer*, 3 Serg. & Rawle 255, words charging the wife with being the author of a libel, were held actionable.

[3] Action sustained for same charge, *Martin v. Stilwell*, 13 Johns. R. 275.

[4] Action sustained for same charge, *Beers v. Strong*, Kirby's R. 12.

it seems to have been allowed, that, had a guilty knowledge been intended, the words would have been actionable. In *Cox (u) v. Humphreys*, the defendant said, "Thy boy (the plaintiff's son) hath cut my purse, and thou hast received it knowing it; and hast the rings and money that were there in thy hand!" And it [*39] was held, that the words were not actionable, because "it did not appear *that a felonious taking* was meant.

And it seems that to charge a brewer with selling unwholesome beer is actionable, since the selling such beer is *an indictable offence (x)*.

In *Sir Lionel Walden (y) v. Mitchell* the defendant said, that the plaintiff went to mass, and the words were held actionable; since by the statute 27 Eliz. c. 4, the offender was liable to forfeit £100, and to be imprisoned for a year.

So, whilst the statutes against witchcraft were in force, it was held, that to say "Thou art a witch and a sorcerer," was actionable (z): And Gawdy, J. said, "If he bewitches men so as they die, it is felony; if he uses witchcraft in any other way, he shall stand in the pillory; so that is a slander in every respect, and a good cause of action."

In *Mayne v. Digle (a)* it is laid down, that *an action lies for any words which import the charge of a crime for which a person may be indicted*.

From these instances cited, and a number of similar ones to be met with in the reports, it seems difficult to find any other limit for the extent of the action than that laid *down [*40] in the last case; and though there are *dicta* and even *decisions* to the contrary, both may, perhaps, be considered as borne down by the current of the authorities cited, and others, in which words have been considered actionable, as charging an indictable offence.

Thus it has been held, that no action lies for publishing of the plaintiff, that he is a *regulator (b)*; and the reason given is, because

(u) Cro. Eliz. 889.

(x) 1 Vin Ab. 477. Free. 25. 6 Bac. Ab. 210.

(y) 2 Vent. 265.

(z) *Rogers v. Gravat*, Cro. Eliz. 571.

(a) Free. 46.

(b) *Scobel v. Lee*, 2 Show. 32.

the offence of regrating, is not punishable by loss of life or limb ; but this decision cannot be considered as law, since it is contradictory to all the cases last cited.

So it has been held, that for the words “Thou art a common barrator (*c*) and I will indict thee for it at the next assizes,” no action lies.

But for the words, “Thou maintainest such a suit,” it was said by Popham, C. J. (*d*), that an action had been held maintainable upon good deliberation, in the case of *Sir H. Portman v. Stowell* ; maintainance being unlawful and odious.

In *Ogden (e) v. Turner*, as already observed, it was expressly held by Holt, C. J. that to render words actionable it is not sufficient that the party may be fined and *imprison- [*41] ed for the offence. For that if any one be found guilty of a common trespass, he shall be fined and imprisoned ; yet no one would assert, that to say one has committed a trespass, will bear an action. This dictum, however, was materially contradicted by what fell from Ld. C. J. De Grey, in giving judgment in the case of *Onslow (f) v. Horne*. In that case he observed “As far as I can collect, for determinations in actions for words, there seem to be two general rules whereby courts of justice have governed themselves, in order to determine words spoken of another to be actionable. *The first rule is, that the words must contain an express imputation of some crimes liable to punishment—some capital offence or other infamous crime or misdemeanor ; and the charge upon the person spoken of must be precise.* In the case of *Ogden and Turner*, the words are, “Thou art one of those that stole my Lord Shaftesbury’s deer !” and were not held actionable ; for though imprisonment be the punishment in those cases, yet per Holt, C. J. “*It is not a scandalous punishment ; a man may be fined and imprisoned in trespass ; for,*” says he “*there must not only be imprisonment but an infamous punishment.*” I think Lord Holt carries it too far, as to precision ; for it is laid down in *Finch’s Law (*g*), “If a man maliciously utters any false [*42]

(*c*) Cro. Eliz. 171. Yel. 90.

(*d*) 1 Vin. Ab. 424. pl. 34. Mo. 428.

(*e*) Salk. 696. Holt. 40.

(*f*) 3 Wils. 177. (*g*) 185.

slander, to the endangering one in law, as to say, 'He hath reported that money is fallen,' for he shall be punished for such report." Here is the case of a crime, and the punishment not infamous; and yet Finch seems to say, that an action lies for these words.

In *Holt v. Scholefield* (*h*), Mr. J. Lawrence observed, with regard to the case in *Bulstrode* (*i*), "I think Mr. Justice Williams goes too far in saying, *that words that tend to the infamy, discredit, or disgrace, of the party, are actionable*."

The most correct rule is laid down in *Onslow v. Horne*. *The words must contain an express imputation of some crime liable to punishment, some capital offence, or other infamous crime or misdemeanour*. There is also a case in *Siderfin* (*k*), which is in direct contradiction to the case in *Bulstrode*."

In many of the cases where charges of crime have been held actionable, it is observable that stress has been laid upon the terms *scandalous* and *infamous*, used as descriptive either of the crime charged or the punishment appertaining to it. Although this affords some reason to infer, that the actionable quality does not extend to all charges of misdemeanour for which fine and imprisonment [*43] may be inflicted, yet a distinction of this nature seems unwarranted by the cases, and would afford a very dubious rule, the terms *scandalous* and *infamous* being of themselves words of very indefinite import. It would be a very difficult task to ascertain the precise point in the scale of offences where infamy and scandal cease to attach.

From these authorities, perhaps, it may be inferred generally, that, *to impute any crime or misdemeanour for which corporal punishment may be inflicted in a temporal court, is actionable without proof of special damage* [1].

(*h*) 6 T. R. 691.

(*i*) 1 Buls. 40.

(*k*) 1 Sid. 48.

[1] The rule deduced by the learned author of the treatise from the cases cited by him as to the nature of the offence imputed, to render the words actionable *per se*, has been restricted to more limited bounds by the Supreme Court of the State of New-York. In *Brooker v. Coffin*, 5 Johns. R. 188, SPENCER, J. observed, "Upon the fullest consideration we are inclined to adopt this as the safest rule, and one which as we think is warranted by the cases: in case

Where the penalty for an offence is merely pecuniary, it does not appear that an action will lie for charging it; even though in default of payment, imprisonment should be prescribed by the statute, imprisonment not being the primary and immediate punishment for the offence (1).

Any objection as to the extent of the above rule, is in a great measure obviated by the Statute of James I. which where the damages given do not amount to forty shillings, limits the costs to the amount of the damages: this wholesome provision was found of great use in confining this species of litigation, (which had before increased to a prodigious extent,) within narrower and more convenient boundaries [1]

(1) 6 Mod. 104.

the charge, if true, will subject the party charged to an *indictment* for a *crime involving moral turpitude*, or subject him to an *infamous punishment*, the words will be in themselves actionable." This rule has been recognized by that court in the subsequent cases of *Widrig v. Oyer and wife*, 13 Johns. R. 124; *Martin v. Stilwell*, 13 Johns. R. 275; *Van Ness v. Hamilton*, 19 Johns. R. 367, and *Young v. Miller*, 3 Hill 22, and is adverted to and approved by two of the judges of the Supreme Court of *Pennsylvania*, in *Andreas and wife v. Koppenhafer*, 3 Serg. & Rawle 255, and by the Supreme Court of *New-Jersey* in *Ludlum v. McCuen*, 1 Harrison's (N. J.) R. 12.

The rule of the Supreme Court of New-York is fully supported by the cases adverted to in the text. In *Walmstey v. Russell*, 6 Mod. 200, it is said that words to be actionable in themselves must charge some *scandalous crime*; they must be such as to impute to the party *an offence for which he may be indicted*, *Mayne v. Digle*, 1 Freem. 46, and see *Purdy v. Stacey*, Burr. 2698; they must *endanger life*, or subject to *infamous punishment*, *Ogden v. Turner*, 2 Salk. 696. In *Onslow v. Horne*, 3 Wils. 177, it is said they must contain an express imputation of *some crime liable to punishment*—some *capital offence* or other *infamous crime* or *misdemeanor*. The rule of *Onslow v. Horne*, is approved by LAWRENCE. J. in *Holt v. Scholefield*, 6 T. R. 694, and by TILGHMAN, C. J. in *Shaffer v. Kintzer*, 1 Binney 542; *McClurg v. Ross*, 5 Binney 218, and in *Andreas and wife v. Koppenhafer*, above cited. See also *Elliot v. Ailsbury*, 2 Bibb's Kentucky R. 473.

In *Massachusetts*, C. J. Parker refused to adopt the rule of *Brooker v. Coffin*, and instead thereof, laid down the following: "an accusation is actionable whenever an offence is charged which if proved may subject the party to a *punishment*, though not *ignominious*, and which brings *disgrace* upon him." See *Miller v. Parish*, 8 Pick. 385.

[1] In New-York, unless the plaintiff recovers a sum exceeding fifty dollars

[*44] *2ndly. In what manner must the offence be imputed.

Where the imputation contains a *direct charge* of crime in precise terms, little difficulty can occur in the application of the foregoing rule. In most instances, however, an unpremeditated use of words of doubtful meaning, or an intentional selection of them, for the purpose of impunity, have occasioned much perplexity and litigation. In a great proportion of cases, the question has been, not whether a charge of a specific offence is actionable? but whether in fact, any offence has been charged by the words? The rule of law requires, that to ground an action, "words imputing crime must be precise;" but it is by no means essential, that they shall carry on the face of them an open and direct imputation. Such a rule, it is clear, would afford no security against calumny, which may be as effectually conveyed in artful allusions to collateral matter, and oblique insinuations, as by the most explicit assertions.

It is, however incumbent upon the party who complains that he has suffered from an imputation of crime, to show with certainty, the injurious nature of the communication.

In order to establish this point, two circumstances are necessary:—

1st. That the words or signs used should either of
[*45] *themselves, or by reference to circumstances, be capable of the offensive meaning attributed to them.

2ndly. That the defendant did, in fact, use them in that sense.

The capability of the words or signs to bear a particular construction, must, it is evident, appear upon the plaintiff's statement of his case; for otherwise it would not judicially appear that he was entitled to recover. That the defendant did, in fact, use them in that sense, is a matter of evidence to be decided upon the trial, which will be a subject for future consideration. It may, however, be necessary to observe here, that if it appear from the words or signs themselves, or from circumstances, that they are capable of conveying the particular meaning attributed to them by the plaintiff, it will, after verdict for the plaintiff, be taken for granted, that the

in an action for slanderous words or libel, he recovers no more costs than damages. 2 R. S. 509, § 6.

words and signs were, in fact, used to convey such meaning ; for that is a matter upon which the jury alone can decide, and which they must be convinced of before they can give their verdict for the plaintiff.

Any objection, therefore, to the words or signs as stated upon the record, is grounded upon the supposition that it does not sufficiently appear, that they are CAPABLE of an actionable meaning.

*It will be proper, therefore, next to consider the dif- [*46] ferent kinds of ambiguities which may arise, not only in the particular case where some crime has been charged, and where doubt most frequently occurs, but with relation to cases of slander and libel in general, which are governed by the same rules of construction.

Words or signs may be divided into three classes :—

1st. Those which bear an obvious and precise meaning on the face of them ; as if A. said to B., “ You murdered C.”

2ndly. Those which on the face of them are of dubious import, and are capable either of a criminal or innocent meaning ; as if A. says to B., “ You were the death of C.”

3rdly. Those which are *prima facie* and abstractedly innocent, and which derive their offensive quality from some collateral or extrinsic circumstance ; as if A. say to B., “ You did not murder C. !” which words, from the ironical manner of speaking them, may convey to the hearers as unequivocal a charge of murder as the most direct imputation.

With respect to ambiguities arising out of the second and third classes, it is now the settled rule of law, that *both judges and juries shall understand words in that sense which the author intended to convey to the minds of the hearers, *as evi- [*47] denced by the whole circumstances of the case. That it is the province of the jury, where such doubts arise, to decide, whether the words were used maliciously, and with a view to defame, such being matter of fact to be collected from all concomitant circumstances ; and for the court to determine, whether such words, taken in the malicious sense imputed to them, can alone, or by the aid of the circumstances stated upon the record, form the legal basis of an action.*

It was long, however, before this rule, rational as it is, and supported by every legal analogy, prevailed in actions for words; and before the favourite doctrine of construing words in their *mildest sense*, in direct opposition to the finding of the jury, was finally abandoned by the courts.

A very few specimens of cases where the doctrine of the *benignior sensus* was allowed to prevail, may be deemed sufficient. "Thou art as arrant a thief as any in England; for thou hast broken up J. S.'s chest, and taken away 40*l*." After verdict for the plaintiff, the court, on motion in arrest of judgment, held, that the action lay not: for, he sheweth not that he stole any money, or robbed him of any money; for an action is not to be maintained by intendment; but by express words, and the words do not prove any felony committed; for the money may be taken away,
[*48] *and the chest broken open in the mid-day (*m*), and in the presence of divers, and therefore it is not any felony.

The defendant said (*n*), "Thou art a lewd fellow; thou didst set upon me by the highway, and take my purse from me, and I will be sworn to it!" After judgment for the plaintiff, error was assigned, because the words did not charge the plaintiff with felony, nor with any felonious taking away; and it may be, he took away the purse in jest, or for some other cause; and of that opinion were all the Judges and Barons. The defendant (*o*) said, "Thou art a thievish rogue, and hast stolen bars of iron out of other men's windows!" It was held, that the action lay not; for the bars of iron are parcel of the freehold, and the stealing of them is not any felony; and it shall not be intended of bars lying in windows, as was objected that it might be; for it shall be taken in the best sense for the defendant. And it was said, that it was adjudged in one *Bridge's* case, that for saying, "Thou art a thief, and hast stolen my corn in the field," no action lies; for it shall be intended standing corn, which is not felony; wherefore it was adjudged for the defendant.

[*49] *In *King* (*p*) v. *Bagg*. In error. The action was for the words, "Mr. J. D. was robbed of £40, and 100

(*m*) *Forster* v. *Browning*, Cro. J. 687.
(*o*) Cro. J. 204.

(*n*) *Holland* v. *Stoner*, Cro. J. 315.
(*p*) Cro. J. 331.

marks' worth of plate, and Alice Bagg (the plaintiff) and J. S. had it, and for which they will be hanged!" And after verdict and judgment for the plaintiff, it was assigned for error, that an action lies not for these words: for he doth not say that she stole it, and it may be that they came to it by lawful means; and although he saith that they will be hanged for it, these words by themselves will not maintain an action, and they do not enforce the first words; wherefore the judgment was reversed.

"Thou (*q*) dost lead a life in manner of a rogue, I doubt not but to see thee hanged for striking Mr. Sydman's man who was murdered!" And it was held that the words were not actionable, for they are not positive for the murder of Mr. Sydman's servant; he might be beaten by the plaintiff, and murdered by another. Actions of slander do not lie upon inference.

It seems to be unnecessary to adduce more instances of the prevalence of this rule of construction; the following may be adduced in support of the more rational doctrine which now prevails.

In *Cecily (r) v. Hoskins*, in error. The words *were, [*50] "Thou art forsworn in a court of record, and that I will prove!" It was contended, after verdict for the plaintiff, that the action would not lie, because he did not say in what court of record he was forsworn, nor that he was forsworn in giving any evidence to the jury; that it might be intended only that he was forsworn, not judicially, but in ordinary discourse in some court of record: But (per Croke) "Jones, Berkeley, and myself, held clearly that the action well lay, and that such foreign intendment as Maynard (for the defendant) pretended, shall not be conceived, and it shall be taken that he spake these words maliciously, accusing him of perjury; and for a false oath taken judicially, upon judicial proceedings in a court of record; and shall be taken according to the common speech and usual intendment: as to say, such a one is a murderer, without saying whom he murdered, or when, an action lies; and it shall not be intended that he was a murderer of hares, unless such foreign intendment be shown or discovered in pleading."

In *Baal (s) v. Baggerley*, the words were: "Thou hast forged a privy seal and a commission! Why dost thou not break open thy commission?" And after verdict for the plaintiff, it was [*51] contended for the defendant, that the *words were not actionable; for it did not say the king's privy seal, nor any writ under the privy seal; also he said not what commission; and the words subsequent, "thy commission," showed that he meant a commission made by the plaintiff himself: but the judges having taken time to consider (Berkeley doubting) afterwards, delivered their opinions—"That the action well lies; for the words be spoken maliciously; and being alleged in the declaration, that he spake them to scandalize him, for forging of the privy seal and commission; and being found guilty, it shall be intended according to the vulgar interpretation, to mean the king's privy seal, the counterfeiting whereof is treason; and a commission shall be intended the king's commission, under the privy seal;" and Berkeley agreed with the others.

In *Somers (t) v. House*, the words were: "You are a rogue, and broke open a house at Oxford; and your grandfather was forced to bring over £30, to make up the breach!" And after verdict for the plaintiff, it was moved, in arrest of judgment; because, *rogue* is not actionable; and *breaking open the house*, but a trespass; and *making up the breach*, might be repairing; but the court seemed contrary: for upon all the words together, a man who [*52] heard *them could not intend other than a felonious breaking of the house; and though in *the old books the rule was, to take the words in mitiori sensu*, yet per Holt, *they would take the words in a common sense according to the vulgar intendment of the bystanders*.

In *Baker (u) v. Peirce*, the words were: "Baker stole my box-wood, and I will prove it!" After verdict for the plaintiff, Serjeant Darnell moved, in arrest of judgment, that these words are not actionable; for they shall be taken to mean wood growing, or the like, whereof only a trespass can be committed. That to say, you are a

(s) Cro. Car. 326.

(t) Holt, 39.

(u) Lord Ray. 959 6 Mod. 234. Holt, 654.

thief, and have stolen my timber, or my apples, or my hops, is not actionable: for where words import either a felony or a trespass, they shall be taken in the mildest sense, unless there be other words to determine them in the worse sense: as to say, he stole my timber out of my yard, or my hops in a bag; and cited *Mason (x) v. Thompson*,—"I charge thee with felony for taking forth from J. D.'s pocket, and I will prove it!" The words were held not to be actionable, because it should not be intended to mean a felony, not being directly affirmed. But Holt, C. J. and the court denied that case to be law, for the taking out *of a man's [*53] pocket must be intended a felonious taking.

For the plaintiff it was contended, that the words, according to common parlance, imported a thing of which felony might be committed.

And afterwards the court gave judgment for the plaintiff; Powell, J. observing, "The case cited by my brother Darnell, is so, but the later books are contrary; and I will stick to the later authorities, being grounded on so much reason."

In the case of *Burges (y) v. Boucher*, the court observed, "There are several cases wherein it has been adjudged, that where words may be taken in a double sense, the court, after a verdict, will always construe them in that sense which may support the verdict."

The plaintiff brought his action for the words, "He (z) is a clipper and a coiner!" After a verdict for the plaintiff, it was moved, in arrest of judgment, that the words did not charge the plaintiff with clipping or coining money; for they may be applied to many other things; but judged actionable, for it must be intended that he meant the clipping of money, and in that sense it is usually understood.

*In *Harrison (a) v. Thornborough*, the court observed, that, "Precedents in actions for words are not of equal authority as in other actions, because *norma loquendi* is the

(x) Hutt. 38.

(y) 8 Mod. 240.

(z) 3 Salk. 325. 2 Vent. 172. 2 Lev. 51. 2 Sir T. Jo. 235.

(a) 10 Mod. 196.

rule for the interpretation of words, and this rule is different in one age from what it is in another. The words which an hundred years ago did not import a slanderous sense, now may, and *vice versâ*. In this kind of actions for words, which are not of very great antiquity, the courts did at first as much as they could, discountenance them, and that for a wise reason; because generally brought for contention and vexation, and therefore, where the words were capable of two constructions, the court always took them *mitiori sensu*. But, latterly, these actions have been more countenanced; for men's tongues growing more virulent, and irreparable damage arising from words, it has been, by experience, found, that unless men can get satisfaction by law, they will be apt to take it themselves. The rule, therefore, that has now prevailed, is, *that words are to be taken in that sense that is most natural and obvious, and in which those to whom they are spoken will be sure to understand them.*

In *Burton (b) v. Hayward and his wife*, the words [*55] spoken by the wife were, "George Button *(the plaintiff) is the man who killed my husband!" her first husband being dead. After verdict for the plaintiff, it was moved in arrest of judgment, that these words are not actionable for the uncertainty of the word *killing*, for it might be justifiable, or in his own defence, or *per infortuniam*, and shall not be presumed felonious, and so made actionable by intendment; for it is a maxim, that words shall be taken in *mitiori sensu*. But it was said by Pratt, C. J. "There can be no question but at this day these words are actionable. In former times, words were construed in *mitiori sensu*, to avoid vexatious actions, which were then too frequent: but now, *distinguenda sunt tempora*: and we ought to expound words according to their general signification, to prevent scandals, which are at present too frequent. *We are to understand words in the same sense as the hearers understood them; but when words stand indifferent, and are equally liable to two distinct interpretations, we ought to construe them in mitiori sensu; but we will never make any exposition against the plain natural import of the words.*" "The word *killing* signifies a voluntary and unlawful killing, and is

actionable. There are a great number of odd cases in the books ;” and by Eyre, J. “ the words are to be taken in *their worst sense*, for a malicious and felonious killing ;” and by Fortescue, J. “ The maxim *for expounding words in *mitiori sensu*, [*56] has for a great while been exploded ; near fifty or sixty years.”

It was observed by Lord Mansfield, in the *King (c) v. Horne*, “ It is the duty of the jury to construe plain words and clear allusions, to matters of universal notoriety, according to their obvious meaning, and as every body else who reads must understand them : but the defendant may give evidence to show they were used on the occasion in question in a different or qualified sense. If no such evidence is given, the natural interpretation of the words, and the obvious meaning to every man’s understanding, must prevail.

“ If courts of justice were bound by law to study for any one possible or supposable case, or sense, in which the words used *might be innocent*, such a singularity of understanding might screen an offender from punishment, but it could not recall the words, or remedy the injury. It would be strange to say, and more so to give out as the law of the land, that a man may be allowed to defame in one sense, and defend himself in another ; such a doctrine would indeed be pregnant with the *nimia subtilitas* which my Lord Coke so justly reprobates.”

In the case of *Peake (d)* and *Oldham*, Lord Mansfield *said, “ After verdict, shall the court be guessing [*57] and inventing a mode in which it might be barely possible for these words to have been spoken by the defendant, without meaning to charge the plaintiff with being guilty of murder ? Certainly not ! Where it is clear that words are defectively laid, a verdict will not cure them ; but where, from their general import, they appear to have been spoken with a view to defame the party, the court ought not to be industrious in putting a construction upon them different from what they bear in the common acceptation and meaning of them. I am furnished with a case, founded in strong sense and reason, in support of this opinion. The name of it is *Ward v.*

Reynolds, Pasch. 12 Ann. B. R. and it is as follows: The defendant said to the plaintiff, 'I know you very well! How did your husband die?' The plaintiff answered, 'As you may, if it please God!' The defendant replied, 'No; he died of a wound you gave him!' On not guilty, there was a verdict for the plaintiff; and on a motion in arrest of judgment, the court held the words were actionable, because, from the whole frame of them, they were spoken by way of imputation; and Lord C. J. Parker said, 'It is very odd, that after a verdict, a court of justice should be trying whether

there may not be a possible case in which words spoken
[*58] by way of scandal might not be *innocently said; whereas, if that were in truth the case, the defendant might have demurred, or the verdict would have been otherwise.' So here, if shown to be innocently spoken, the jury might have found a verdict for the defendant; but they have put a contrary construction upon the words as laid, and have found that the defendant meant a charge of murder."

In the *King (e) v. Watson and others*, Mr. Justice Buller observed, "Upon occasions of this sort, I have never adopted any other rule than that frequently stated by Lord Mansfield to juries, desiring them to read the paper stated to be a libel, as men of common understanding, and say, whether, in their minds, it conveys the sense imputed."

In *Woolnoth (f) v. Meadows*, it was observed by Le Blanc, J. "That (after a verdict for the plaintiff,) it is not sufficient to show, by argument, that the words will admit some other meaning; but the court must understand them as all mankind would understand them: and we cannot understand them differently in court from what they would do out of court.

In *Roberts (g) v. Cambden*, which was an action for words alleged by the plaintiff to contain an imputation of perjury.
[*59] After a verdict for *the plaintiff, on a motion in arrest of judgment, on the ground that the words did not impute the crime with sufficient certainty, Lord Ellenborough, C. J. in delivering judgment, observed, "The question simply is—Wheth-

er the words amount to such a charge? that is, whether they are calculated to convey to the mind of an ordinary hearer, an imputation on the plaintiff of the crime of perjury. The rule which at one time prevailed, that the words are to be understood in *mitiori sensu*, has been long ago superseded; and words are now construed by courts, as they always ought to have been, in the plain and popular sense in which the rest of the world naturally understand them” [1]. And in concluding, the same learned judge observed, that, “without adverting to the long bead-roll of conflicting cases which have been cited on both sides in the course of this argument, it is sufficient to say, that these words, fairly and naturally construed, appear to us to have been meant, and to be calculated to convey the imputation of perjury actually committed by the person of whom they are spoken, and that, therefore, the rule for arresting the judgment must be discharged.”

From these cases, containing the opinions of some of the most enlightened judges of their own or any times, it may be collected—

1st. That where words are capable of *two constructions*, *in what sense they were meant is a matter of fact [*60] to be *decided by the jury* [2].

2ndly. That they are to be guided in forming their opinion by the impression which the words or signs used were calculated to make on the minds of those who heard or saw them, as collected from the whole of the circumstances.

3dly. That such words or signs will, after a verdict for the plaintiff, be considered by the courts to have been used in their worst sense.

With respect to words, which apparently are harmless, and which derive their offensive meaning wholly from extrinsic circumstances, the preceding observations are applicable: the use of such words and signs as do in effect injure the reputation of an individual, are as much within the mischief as the most open charges: the grievance is, the loss of character; and by what means the wrong is

[1] See *Damarest v. Haring*, 6 Cowen 37, and *Walton v. Singleton*, 7 Serg. and Rawle 451.

[2] See *Van Vechten v. Hopkins*, 5 Johns. R. 221; *Dexter v. Taber*, 12 Id. 240; *McKinly v. Rob*, 20 Id. 356; *Gorham v. Ives*, 2 Wendell 534; *Gibson v. Williams*, 4 Wendell 320.

effected is perfectly immaterial, either as to the suffering of the party, or the policy of the law providing him a remedy.

The (h) defendant wrote a pamphlet, called "Advice to the Lord Keeper, by a Country Parson;" wherein he would have him love the church as well as the Bishop of Salisbury—manage as well as Lord Haversham—be brave as another lord; and so gave every lord a character, *ironically; and so it was set forth in [*61] the information, and the jury found him guilty. Upon motion in arrest of judgment, it was shown for cause, to arrest judgment, that there was no cause to charge the defendant, because he said no ill thing of any person; and all he said was good of them. But to this it was answered, and resolved by the court, that this was laid to be *ironical*; and *whether it was so or not, the jury were judges*: they found it so. And that if this were not a crime, the defendant might, by contraries, libel any person [1].

Having thus inquired what general rules of construction have been adopted by the courts—their application to the class of cases where crime is imputed, and the degree of certainty and particularity requisite to render such charges actionable, will next be considered.

The charge, to be actionable, must in general, as already stated, impute to the *plaintiff* an *act of a criminal nature*.

There are, however, some exceptions to this rule; as where treason is imputed: one species of which offence consists in the *compassing and imagining the death of the king*; which words signify nothing more than the purposed design of the mind, and not the carrying such design into effect (i).

[*62] *In the case of *Sir John Sydenham (k) v. Man*, the words were, "If Sir J. S. might have his will, he would kill the king!" and they were held to be actionable, although they referred to the will only; since it is a great offence to have such a will.

(h) Holt. R. 425.

(i) 1 Haw. Pl. C. 86.

(k) Cro. J. 407.

[1] See *Andrews v. Woodmanse*, 15 Wendell 232, recognizing this principle. See also, *Gibson v. Williams*, 4 Id. 320; *Woolnoth v. Meadows*, 5 East. 463; and *Rex v. Horne*, 2 Cowp. 683.

So where the party is charged with misprision (*l*) of felony ; as where the defendant said, “ He (*n*) knew of the murder of L., and did not reveal it till long after it came to his knowledge.”

In other cases it must appear,

I. That some ACT was imputed by the defendant.

II. That such act is of a CRIMINAL NATURE.

III. That it was meant to be imputed to the PLAINTIFF.

I. That some ACT was imputed by the defendant.

The imputation of an act may be inferred,

1st. Although the terms of the communication be indirect.

2dly. Although the act imputed be, in legal strictness, impossible.

1st. Where the terms of the communication are indirect. It may be laid down as a general rule, that wherever words are used, calculated to impress *upon the minds of the hear- [*63] ers a suspicion of the plaintiff's having committed a criminal act, such an inference may and ought to be drawn, whatever form of expression may have been adopted. And although such forms of expression may be reduced under general heads, and examples cited under each to illustrate this rule, yet, contradictory and inconsistent as many of the cases are, a reference to them cannot be considered as of essential importance ; the rule itself being so well established, that no case in contradiction to it can now be considered as a precedent.

It may, however, be deemed proper to select a few instances of cases falling under each division.

Where the terms of the communication are indirect, the imputation of an act committed may be inferred, where the defendant expresses a *suspicion* or *opinion*, or *institutes a comparison*, or delivers the words as matter of *hearsay*, or by way of *interrogation* or *answer*, or *exclamation*, or uses *disjunctive* or *adjective* words, or speaks *ironically* ; or, in general, where the statement virtually includes or assumes the commission of the principal act, or a strong suspicion of it.

From words of *suspicion* or *opinion*. Yeoman (*n*) said of Hext, “ For my ground in Allerton *Hext seeks my [*64]

(*l*) Vid. st. West. 1. 3 Ed. 1. c. 9. (*m*) Yel. 154. 1 Vin. Ab. 446.

(*n*) 4 Co. 15. Poph. 210. Latch. 176. 3 Buls. 262.

life; and if I could find John Silver, I do not doubt but within two days to arrest Hext for suspicion of felony." It was adjudged, that for the first part of the words, "for my ground in Allerton, Hext seeks my life," no action lay, for two reasons; 1st, because he may seek his life lawfully and upon just cause, and his land may be held of him. 2dly. Seeking of his life is too general; and for seeking only no punishment is inflicted by law. But for the latter words, it was adjudged, that the action lay; because for suspicion of felony he shall be imprisoned, and his life drawn in question.

The defendant hearing that his father's barns were burnt, said (o), "I cannot imagine who should do it but the Lord Stourton," and the words were held to be actionable [1].

An action lies for publishing of the plaintiff, "I (p) think, or I dreamed, he committed a certain felony;" for although the words be not directly affirmative, the plaintiff may, by reason of them be arrested upon suspicion of having committed that felony.

The defendant said, "He (q) is infected of the robbery and murder lately committed, and doth smell of the murder;" and the plaintiff had judgment, after long deliberation and argument; and this decision was cited and approved of in a number of subsequent cases. (r)

So for the words, "I (s) am thoroughly convinced that you are guilty," &c. for "I am thoroughly convinced," is equal to a positive averment: a man only avers a thing because he is convinced of the truth of it.

(o) Mo. 142. 1 Vin. Ab. 435. pl. 13.

(q) *Smith v. Wisdome*, Cro. Eliz. 348. 6 Bac. Ab. 227.

(r) 1 Vin. Ab. 435.

(r) 3 Bulst. 249. God. 90. Hutt. 58. Cart. 214.

(s) *Peake v. Oldham*, Cowp. 275.

[1] "My watch was stolen in Polly Miller's bar; I have reason to believe that Tina M. took it, and that her mother Polly concealed it," *Miller v. Miller*, 8 Johns. R. 174; "I will venture any thing he has stolen the book," *Ney v. Otis* 8 Mass. R. 122; and expressions by the defendant that he had reason to believe that the plaintiff burnt the barn. *Logan v. Steele*, 1 Bibb. 593, were held to be actionable. See also *Bornman v. Boyer*, 3 Binney 515.

So for the words, "If (*t*) thou hadst thy rights, thou hadst been hanged for such a felony," an action lies.

But words of mere suspicion or opinion, and which do not directly or indirectly impute any act, are not actionable (*u*).

In a late case (*x*) *where the defendant said of the [*66] plaintiff, "I will take him to Bow street, on a charge of felony;" (innuendo, that the plaintiff had been and was guilty of forgery;) it was held that the words were not actionable, as they charged, not that he was a felon, but only suspicion of felony. And the cases of *Wood v. Merrich* (*y*), and *Pollard v. Mason* (*z*), were cited by Gibbs, C. J. where it was held that the words should affirm the plaintiff to be a felon: that a mere assertion that the defendant charged him on suspicion of felony was not of itself actionable.

But yet it is difficult to say that an imputation of a crime may not be most effectually conveyed by such an assertion, and if so, the case embraces all the mischief consequent upon the most direct allegation (*a*)

(*t*) Brownl. 3.

(*u*) Com. Dig. Action on the case for defamation, F. 13. and per Holroyd, J. in *Hodgson v. Scarlett*, 1 B & A. 243. Thus it has been held, that for the words, "He deserves to be hanged," no action lies. 1 Rol. 43. 1. 10. 15. So no action lies for the words "I count thee to be a witch." 1 Rol. 46. 1. 35. So it was held, that no action lay for saying, "I will prove thee to be a thief; I will prove it by thy son, or send him to the devil;" for (as was said) the last words denote his doubt. Cro. J. 214. The last decision seems to be of very dubious authority; for the first part of the words, will prove thee to be a thief, clearly denote that an act was meant to be imputed, and the latter words merely import that the fact was within the knowledge of the son, who would place himself in jeopardy by absolving the father. And see the cases cited below, as to adjective words, &c. p. 71.

(*x*) *Harrison v. King*, 4 Price, 46. In the Exchequer Chamber, on a writ of error brought.

(*y*) Roll. Ab. p. 73. pl. 21. 1. 50.

(*z*) *Ib.* Hob. 381.

(*a*) In the case of *Davis v. Noak*, 1 Starkie's C. 372, where the declaration, in an action for a malicious prosecution, alleged that the defendant charged the plaintiff with felony, it was held to be supported by evidence, that the defendant stated to the magistrate that he had been robbed of specific articles, and

[*67] *It seems to be properly a question for the jury, whether the defendant, though he used words of suspicion only, did not mean, in effect, to impute the substantive crime to the plaintiff. In the case of *Tempest v. Chambers* (b), it appeared that the defendant, having obtained a warrant for the apprehension of the plaintiff, (which had been improperly issued upon an information before the magistrate of facts which amounted to no more than a mere trespass,) on meeting Salmon, an agent of the plaintiff's, said, "I have got a warrant for Tempest, I will advertise a reward of twenty guineas to apprehend him; I shall transport him for felony." And Lord Ellenborough left it to the jury to say whether the defendant was speaking with reference to the warrant which had been improvidently issued, or he meant substantively to impute a charge of felony. The jury found for the plaintiff.

It is observable that the cases of *Wood v. Merrick*, and of *Pollard v. Mason*, which were cited as conclusive authorities, in the

Exchequer Chamber, in the case of *Harrison v. King*, [*68] can *scarcely be regarded as authorities at this day.

The words in the former case were, "I charge you with felony;" in the latter, "I charge him with felony, in taking money out of the pocket of J. S." In common understanding, the defendant would be taken to assert, in the former case, that the plaintiff was guilty of felony; in the latter, that he had actually taken money out of the pocket of J. S. feloniously; the words, I charge you with such a fact, naturally import not merely that the fact is true, but that the speaker is so convinced of its truth, that he ventures to act upon it by making a deliberate charge.

From words of *comparison*. The defendant said, "You (c) are as great a rogue as J. S., who stole quilts!"

So for saying, "Thou (d) art as arrant a thief as any in England," an action lies.

that he suspected and believed, and had reason to suspect and believe, that the plaintiff had stolen them. Per Lord Ellenborough, C. J. and Abbott and Holroyd, Js. Bayley, J. dissent. But note that Mr. J. Bayley differed from the rest of the court merely on the point of variance, and not upon the general question, whether a malicious charge, though of suspicion only, was actionable.

(b) 1 Starkie's C. 67. (c) *Upton v. Pinfold*, Com. 267. (d) *Cro. J.* 687.

So for the words, “As (*e*) sure as God governs the world, and King James this kingdom, J. N. hath committed treason.”

From words of *hearsay*. As where the defendant said, “A (*f*) woman told me that she heard one say, that Meggs, his wife, had poisoned *Griffin, her first husband, in a mess [*69] of milk.” And in case of words so spoken, it seems to be immaterial whether the speaker really heard the words or not; unless (*g*), as will afterwards be seen, at the time of repeating them he afford the plaintiff a cause of action against the original author [1].

From words of *interrogation* (*h*). As where the defendant said, “When (*i*) wilt thou bring home the nine sheep thou stolest from J. N.?”

So an action lies for saying, “Did (*k*) you hear that J. S. is guilty of treason?”

A. (*l*) the wife of B. was asked by C. “Wherefore will your husband hang J. S.?” she answered, “For breaking our house in the night, and stealing our goods.” The words were held to be actionable, for though they were spoken in answer to a question, they amount to a charge of stealing goods.

The defendant published the following advertisement: “This (*m*) is to request, that if any *printer or other [*70] person can ascertain that James Delany, Esquire (the plaintiff), some years since residing at Cork, late Lieutenant in the North Lincoln Militia, was married previous to nine o’clock in the morning of the 10th of August, 1799, they will give notice, &c., and receive the reward.” And it was left by Lord Ellenborough,

(*e*) Sid. 53.

(*f*) Golds. 139. Mo. 408. Cro. E. 645.

(*g*) Woolnoth *v.* Meadows, 5 East, 463. Cro. J. 162. 406.

(*h*) For words of interrogation in general, see Mo. 418. pl. 573. 2 Rol. Rep. 165. Palm. 66. 12 Rep. 134. Cro. J. 422. Keb. 559. pl. 52.

(*i*) Hunt *v.* Thimblethorpe, Mo. 418. 1 Vin. Ab. 429.

(*k*) Earl of Northampton’s case, 12 Rep. 134.

(*l*) Hayward *v.* Naylor, 1 Rol. Abr. 50.

(*m*) Delany *v.* Jones, 4 Esp. C. 191.

[1] See note [1] page 340 *infra*.

C. J. to the jury to say whether the advertisement imputed a charge of bigamy to the plaintiff.

So where the words are spoken by way of *exclamation*: as, "That (*n*) perjured villain!"

From *disjunctive words*. It has been said that, where two charges are made disjunctively, one of which is actionable and the other not, no action lies. The defendant said, "Thou (*o*) hast stolen my mare, OR didst consent to the stealing of her." It was held, that the action was not maintainable, on account of the latter words. And so where a charge was imputed in the alternative; as where the defendant said "Sparkham did steal a mare, *or else* Godwin is forsworn!" Although it was averred that Godwin never did swear any such matter, the charge was held to be too indirect to bear an action.

In the case of *Stirley (p) v. Hill*, the words were,
[*71] "Thy brother was whipped about Taunton *Cross, for stealing sheep; *or* burned in the hand or shoulder." And the court, after verdict for the plaintiff, were of opinion, that the words did not import any certain slander.

These decisions, however, can scarcely be considered as precedents at this day, for it is clear that a charge of felony may be completely conveyed by such disjunctive imputations; and were they not actionable, the legal consequences of slandering might in every case be easily avoided.

The same objection once prevailed, where the person and not the act was stated in the disjunctive.

The defendant said, "She (*q*) had a child, and either she or somebody else made way with it!" And three justices against the opinion of Bridgman, C. J. adjudged, that the words were not actionable. But in a subsequent (*r*) case this decision was overruled; and upon the same principle, no doubt, it would now be held, that words imputing a criminal act in the disjunctive, are also actionable.

From *adjective words*. Where the words impute inclination only, they are not actionable; as to say, "J. (*s*) S. is a murderous

(*n*) Roll. Ab. 76. (*o*) Cro. Eliz. 780. (*p*) Cro. Car. 283. (*q*) Cart. 55, 56.

(*r*) Harrison v. Thornborough, 10 Mod. 196. (*s*) Ld. Ray. 236.

villain!" *But where the participle is used, it is other- [*72]
wise; as to say, "J. (*t*) S. is a murdering villain!"

The words in the former case importing an inclination only, in the latter an act done. So the words, "Dr. (*u*) Sybthorp is robbing the church," were held to be actionable; and to say such a person is robbing such a man, or ravishing such a woman, is actionable.

So, "Where is that long shag-haired, murdering, rogue?" was held to be actionable (*x*).

For the words, "Traitorous knave," an action has been held to be maintainable, though not for the words, "Rebellious knave;" and perhaps this distinction may even now be considered as good law, although many of the nice subtleties which were formerly in fashion are now disregarded; since, though traitorous be a mere adjective, not implying any act, yet the consideration that the offence frequently consists in intention only, may well constitute this case an exception (*y*) to the general rule.

It is laid down by Sir Edward Coke (*z*), that sometimes adjective words will maintain an action, and sometimes not. They are actionable,

1. When the adjective presumes an act committed.

*2. When they scandalize a person in his office or [*73]
function, or trade, by which he gets his living. As if a man says, "That one is a perjured knave!" There must be an act done, for otherwise he cannot be perjured. The words, "seditious (*a*) and thievish knave," have been held not actionable.

And the distinction has been frequently taken, that "thieving rogue," imports an act; "thievish rogue (*b*)," an inclination only.

So for the words, "You (*c*) are no thief!" an action lies, if they be spoken ironically.

And next, the imputation of an act may be inferred from any

(*t*) Cro. Car. 318.

(*u*) 1 Rol. Ab. 176.

(*y*) Cro. Eliz. 171. Lev. 90.

(*a*) 4 Rep. 19. Cro. J. 65, 66. 2 Bulst. 138. Ld. Ray. 236.

(*b*) Dorrell v. Grove, Freem. 279.

(*x*) Cro. Car. 318; Jo. 326.

(*z*) 4 Co. 19.

(*c*) 1 Vin. Ab. 430. pl. 8.

statement, which virtually includes or assumes the commission of the principal act, or a strong suspicion of it.

The defendant said, "I (*d*) could prove J. S. perjured, if I would!" and the words were held to be actionable; for, if true, J. S. must have committed an act of perjury.

So where the defendant said, "Thou (*e*) art a rogue, a runaway rogue, and didst run away from Oxford; and thou art a rogue of record." The words were held to be actionable; for

[*74] if *true, the plaintiff must have been convicted of record.

The defendant said to the plaintiff, "In (*f*) Black-bull Yard you could procure broad money for gold, and clip it when you had so done." It was objected, that the words were not actionable, for they merely imputed a *power*, and not an *act*. But the court held, that the limitation to place implied an act, for that, if a power alone had been meant to be imputed, the limitation to place would have been unnecessary—a power to do being the same in all places.

So in *Horne v. Powell* (*g*), the defendant said, "You may well spend money at law, for you can coin money out of halfpence and farthings!" It was held, that the words were actionable, and implying an *act*; for by a *mere power*, the plaintiff could never be able to spend money at law.

The defendant said of the plaintiff, He (*h*) was put in the round-house, for stealing ducks at Crowland;" and judgment was given for the plaintiff. For though the court were at first of opinion, that they were bound by former authorities, and that if judgment were to be given for the plaintiff, many actions would arise at every

[*75] every *assizes in the kingdom, where the common topic of conversation is, that such a man was sent to goal for such a crime; yet, afterwards, they changed their opinion, and held, that the jury having found the words to have been falsely spoken, they clearly imported that the plaintiff had been guilty of a crime: that the objection was, that the words did not expressly allege that the

(*d*) 1 Vin. Ab. 406. pl. 2.

(*f*) Salk. 697. *Speed v. Parry*.

(*h*) *Beavor Hides*, 2 Wils. 300.

(*e*) Sty. 220. 1 Vin. Ab. 415.

(*g*) Salk. 697.

plaintiff had stolen the ducks, but that words must be taken according to common parlance.

And so in a number of other cases, the asserting the plaintiff to have been confined or punished (*i*) for a certain offence, has been held to be actionable, for the imputation, at all events, throws strong suspicion upon him.

So where the defendant said, "He (*k*) is under a charge of prosecution for perjury; G. W. had the Attorney-General's instructions to prosecute." It was held that the words were actionable, as being calculated to convey the imputation of perjury.

So where the defendant said of the plaintiff, "His (*l*) character is infamous; he would be disgraceful to any society. Whoever proposed him must have intended it as an insult; I will pursue *him and hunt him from all society. If his name [*76] is enrolled in the Royal Academy, I will cause it to be erased, and will not leave a stone unturned to publish his shame and infamy. Delicacy forbids me from bringing a direct charge; but it was a male child of nine years old who complained to me."

So where the defendant said, "I (*m*) dealt not so unkindly with you, when you stole my stack of corn."

The defendant said to a husband in London, "You (*n*) are a cuckoldy old rogue!" and the words were held to be actionable, for they imply that the wife is a whore, for which, by the custom of the city, she is liable to temporal punishment.

Words imputing *intention* only to commit crime, are not actionable of themselves, unless in the case where the intention is of a treasonable nature (*o*).

As, if one say to another, "Thou (*p*) wouldst have killed me," no action lies [1].

(*i*) Cro. J. 247.

(*k*) Roberts v. Camden, 9 East. 93. (*l*) Woolnoth v. Meadows 5 East. 463.

(*m*) Cooper v. Hawkswell, 2 Mod. 58. (*n*) 1 Str. 471.

(*o*) Cro. J. 471. "To impute evil inclinations to a man, which were never brought into action, is not actionable. Words to be actionable, should be unequivocally so." Per Lord Ellenborough C. J. in Harrison v. Stratton, 4 Esp. C. 218.

(*p*) Dr. Poe's case, cited by Coke and Haughton, 2 Buls. 206. 1 Vin. Ab. 440.

[1] In Cornelius v. Van Slyck, 21 Wendell 70, the words "you will steal,

[*77] *So for the words, "She (*q*) would have cut her husband's throat, and did attempt it," an action lies; because an attempt, that is an act, is charged; but in the same case it was held, that for the first words, "she would have cut her husband's throat," no action could be maintained.

2dly. Where the act charged is, in legal strictness, impossible.

Where a criminal charge is conveyed by the defendant's expressions, the liability to make reparation cannot be effected by any impropriety in the terms of the communication, whether legal or grammatical; for the loss of character, and its probable consequences, constitute the ground of action, without reference to the means employed. The contrary doctrine, indeed, at one time, prevailed.

It has been holden, that if a married woman say, "You (*r*) have stolen *my* goods," the words are not actionable, the words being repugnant; for as a married woman cannot have goods of her own, she cannot be robbed of any.

But in *Charnel's* case (*s*), which was earlier than the preceding, the wife said, "My turkeys are stolen, and Charnel hath [*78] stolen them;" and *the same objection being made in arrest of judgment, the court said, "The wife did charge the plaintiff with stealing her turkeys; and if a person who had no horse were to publish these words, 'J. S. hath stolen *my* horse,' the discredit would be as great to J. S. as if the publisher had had a horse; for every person who heareth the words may not know whether he had a horse or no." And in the subsequent case of *Stamp (t) v. White*, the defendants's wife said, "Thou art a thievish rogue, for thou hast stolen *my* faggots!" Although it was objected that the words were without meaning; for a married woman could not have property of her own, yet it was held, that the

and I can prove it," were held actionable on demurrer, on the ground that they might well be taken to import a charge that the plaintiff had been guilty of theft. It was conceded where the words plainly import a charge of *mere intention* to do a criminal act, or amount only to an assertion that they are not actionable.

(*q*) Lane 98. 1 Vin. Ab. 440. pl. 9.

(*r*) 1 Roll. Ab. 74. 6 Bac. Ab. 238.

(*s*) Cro. Eliz. 279.

(*t*) Cro. Jac. 600.

words were actionable; and it was to be understood according to common intendment, that the defendant charged the plaintiff with stealing *her husband's* faggots.

So where the defendant said, "These (*u*) guineas are Mr. Bendish's (the plaintiff's); and were *given me* to vote for him." It was urged, on motion in arrest of judgment, that the words are insensible; for that when the plaintiff has given money to the defendant, it cannot be the plaintiff's money; but judgment was given for the plaintiff.

The older cases, indeed, carried the doctrine of repugnancy to a very unreasonable extent; and *the [*79] courts arrested judgments, not only on the ground that an actual inconsistency appeared on the face of the record, but even where no inconsistency appeared, because such might by possibility exist.

The rule, however, seems to be now established, that no inconsistency or grammatical impropriety will prevent the words from being actionable, where the intention to charge the plaintiff with the commission of a crime plainly appears.

II. The CRIMINAL QUALITY of the matter charged must appear with certainty.

This may appear,

1st. From the use of general terms of known legal import.

2ndly. From circumstances explaining the meaning of terms otherwise doubtful, or innocent.

3rdly. From the mere description of the circumstances constituting the offence.

1st. From the use of terms of known legal import.

It seems at one time to have been understood that no charge was actionable, when conveyed in terms, which did not particularize the circumstances of the offence. So that to say a man was "a traitor (*w*), or a thief," did not afford him a ground of action, *unless he had sustained special damage from the [*80] words. And to such an extent was the nicety carried, that even in cases where the words did state some of the circum-

(*u*) 11 Mod. 174.

(*w*) Bro. Action, sur le Cas. 27 H. 8, 11.

stances, it was held to be incumbent on the plaintiff to prove that facts connected with the charge were partially true, in order to render it the more probable that he might have been placed in jeopardy by the accusation. And this affords reason to suppose that, originally, the only ground of allowing such an action, without proof of special damage, was, the danger to which the party was exposed of a criminal prosecution, to which he could scarcely have been subjected by a bare general charge, unsupported by any facts or circumstances which might give it colour (x).

Thus, in the case of *Jacob (y) v. Mills*, it was held, that for the words, "He hath poisoned J. S. and it shall cost me 100*l.* but I will hang him," no action was maintainable, because the plaintiff did not aver (and of course prove) that J. S. *was dead* at the time the words were spoken.

The defendant said, "Sir Thomas Holt struck his [*81] cook on the head with a cleaver, and cleaved *his head; the one part lay on the one shoulder, and another part on the other." After verdict for the plaintiff, judgment was arrested, upon the ground that it did not appear that the cook was killed.

But in other cases, both prior and subsequent to the former, similar objections were overruled. In the case of *Webb (z) v. Poor*, the words were, "I will call him in question for poisoning my aunt, and I make no doubt to prove it." It was moved in arrest of judgment, that the plaintiff had not averred that his aunt was poisoned; but the court would not allow the objection, saying, that the plaintiff's credit was impeached, whether she was poisoned or not. And the same point was ruled in *Tulbot (a) v. Case*, where it was said, that the death of the person alleged to have been murdered, would be intended, unless the contrary appeared. Still, however, it was held, that if it appeared that the person said to have been murdered

(x) It seems that formerly slander was not actionable, unless it occasioned special damage or affected the life of the party. 2 Vent. 28.

(y) Cro. J. 331. 343. 1 Vent. 117.

(z) Cro. Eliz. 569.

(a) Cro. Eliz. 823.

was in fact living, no action could be maintained. The plaintiff (b) showed in his declaration, that the defendant had a wife yet living ; and that he said of the plaintiff, "Thou hast killed my wife ; thou art a traitor !" and it was held that no action lay ; and a *distinction was taken between the case where the [*82] person stated to have been murdered was still alive, and where he was dead ; that, the wife being alive, no action lies, although the defendant says that the plaintiff has murdered her ; since it appears that no murder of her can have been committed nor the plaintiff in any jeopardy ; and so the words are vain ; and no scandal or damage to the plaintiff.

To require the plaintiff to prove, that the party, with whose murder he is charged, is actually dead, would be highly unreasonable and inexpedient ; since the slanderer might secure impunity by fixing either upon a fictitious person as the supposed victim of the murder, or upon some real person whose death the plaintiff might not be able to prove.

In the case of *Snag v. Gee*, (cited by Sir E. Coke (c), in his fourth report,) it appeared upon the record, that the wife, alleged to have been murdered, was still alive ; and the action was held not to be maintainable, because the plaintiff was not put in jeopardy by the words.

It cannot, however, fairly be inferred from this, that the plaintiff is in all cases precluded from recovering, although the person, alleged to have been murdered, should be still alive ; since *the plaintiff's life, or liberty at least, may have been [*83] placed in jeopardy in consequence of the injurious report, though, in fact, at the time of pleading, or upon the trial, the defendant may be able to prove the person alleged to have been murdered to be still living. The words, if actionable without special damage, must be so immediately when spoken ; and their actionable quality must then depend upon the fact, whether the hearers were aware that the person alleged to be murdered was really alive ; if they did not know the fact, then all the consequences (the probability of which renders a charge of murder in any case actionable,)

(b) *Snag v. Gee*, 4 Rep. 16. 9 Cro. Car. 484.

(c) 4 Rep. 16. 9.

may follow ; since, unfortunately, several melancholy instances may be cited where an accused person has suffered for the supposed murder of one who survived him.

Should it, however, precisely appear, upon the plaintiff's own statement, that the person charged to have been murdered was alive when the words were spoken, it would probably be presumed that the hearers knew the fact.

The plaintiff (*d*) declared that the defendant said of him, " He is a base gentleman, and had three or four children by A. S. his maid servant ; and after killed them, or caused them to be [*84] *killed ;" and then averred, that he never was guilty of any incontinency with A. S. nor any other, nor of any such felony or murder. After verdict for the plaintiff, it was objected, in arrest of judgment, that inasmuch as he had averred that he never was guilty of any incontinency with A. S. it was all one as if he had averred that he never had any child by A. S. and that if he had so averred, no action would lie ; for then it would appear to the court, that there was no such thing in *rerum natura*, as is supposed to have been killed. But it was adjudged for the plaintiff ; because it was not *specifically averred* that he had no child by A. S., but only generally, that he was not incontinent with her.

And the like degree of particularity has been required in other cases where felony has been charged.

Thus, for the words, " Thou (*e*) hast committed burglary in breaking his house, and taking his goods." It was held, that no action was maintainable ; it being uncertain, as no person was named, whose house and goods were meant. And, upon the same principle, it was held, that a general charge of forgery (*f*) was not actionable, without reference to some particular deed, [*85] *instrument, or other subject matter. So it was held, that a general charge of subornation (*g*) of perjury was not actionable, unless it appeared that the perjury had been committed.

These doctrines have, however been long exploded ; and the rule

(*d*) 1 Vin. Ab. 409. pl. 4. Poph. 187. Jo. 141. Lat. 159. Cart. 55. Comb. 132.

(*e*) Brown v. St. John, 1 Rol. Ab. 71.

(*f*) 3 Leon. 231.

(*g*) 6 Mod. 200.

seems now to be perfectly established, that an action is maintainable for a *general imputation conveyed in apt terms*.

The establishment of this rule necessarily defeated another nicety, which has been alluded to as having formerly been countenanced by the courts, namely, that when the charge described any circumstances of the offence, it was incumbent upon the plaintiff to show the existence of such particulars as might serve to give color to the defendant's imputation, since it would be absurd to allow a remedy against general charges where no color could be shown, and to deny it where the imputation was equally prejudicial, because it contained particulars, which particulars the plaintiff might be equally unable to prove.

As for instance, if for the words, "you committed a murder," the plaintiff be entitled to recover, it would be highly unreasonable in an action for the words, "You murdered J. S." to require him to prove that such a person as J. S. had existed, but was dead at the time the words were spoken.

*It may next be proper to refer to a few cases where [*86] general words have been held to be actionable.

An action has been held to be maintainable for the words traitor (*h*), murderer, (*i*), thief, (*k*) sheep-stealer (*l*).

For charging another with felony (*m*), perjury (*n*), subornation of perjury (*o*), forgery (*p*), robbery (*q*.)

It was once held, that to call another a pick-pocket (*r*), did not amount to a charge of felony; this decision has, however, been overruled (*s*).

(*h*) Dal. 17. Bro. Ac. sur le Cas. pl. 2. 27 II. 8. 14. [i] Mo. 29.

(*k*) But the term *thief* will not be actionable, if it appear from the context that it was not used in a felonious sense. Should this appear on the plaintiff's own showing, he would be nonsuited. See *Thompson v. Bernard*, 1 Camp. 48. *Christie v. Powell*, Peake's C. 4. Otherwise it will be incumbent on the defendant to show that the word was not used in a felonious sense. Vide infra, *Evidence in Defence*.

(*l*) 3 Buls. 303. (*m*) Jo. 32. Cro. Car. 276. Poph. 210. Sty. 235.

(*n*) Ow. 62. Noy, 61. 1 Vin. Ab. 405.

(*o*) Cro. Eliz. 308, Cro. J. 158. 1 Rol. Ab. 41.

(*p*) *Jones v. Herne*, 2 Wils. 87.

(*q*) Cro. J. 247.

(*r*) 3 Salk. 325.

(*s*) 11 Mod. 255.

Whilst the statutes against witchcraft remained in force, it seems that the term witch was not actionable, unless it was coupled with some act of witchcraft; the cases, however, relating to [*87] this *offence, are so inconsistent with each other, and with any settled principle, as to appear incapable of affording any illustration of the subject of this treatise.

To charge one with having *cozened* another, has, in a great number of cases, been held to be too indefinite to support an action. The defendant said, "Thou (*t*) art a cozening knave, and hast cozened me out of 500*l*." and it was held that no action lay.

So to accuse (*u*) another, of cheating is too general to support an action [1].

So to say, he (*x*) is a rogue, varlet, or the like, is not actionable [2]. So to say, "Thou (*y*) art a common filcher, a companion of cut-throats," &c.

So to say, "He (*z*) is a bloodsucker, and not fit to live in the commonwealth; and his child, not born, is bound to curse him."

2dly. The *criminal quality* of the act imputed may appear from circumstances explaining the meaning of words doubtful or innocent.

In consideration of law, that is certain which can be so rendered: it is, therefore, of no importance whether the terms used [*88] be doubtful, or even *apparently innocent, provided it can be shown that they could and did convey the offensive meaning which forms the ground of complaint.

An imputation of being *forsworn* is the most common instance of cases falling under this division, and has given rise to a numerous class of decisions [*a a*].

(*t*) Hutt. 13. 1 Vin. Ab. 427. pl. 9. 3 Lev. 171. Cro. Eliz. 95. Ow. 47. Buls. 172. Show. 181. God. 284. Cro. J. 427.

(*u*) 2 Salk. 694.

(*x*) 4 Rep. 15. b. Ld. Ray. 1417.

(*y*) Cro. Eliz. 554.

(*z*) Noy, 64.

[1] See Chase *v.* Whitlock, 3 Hill 139; Stevenson *v.* Hayden, 2 Mass. R. 406.

[2] See Caldwell *v.* Abbey, Hardin's R. 530.

[*a a*] Where the words were "Mr. H.'s oath is not to be taken, for he has been a forsworn man; I can bring people to prove it, and they that know him will not sit in the jury-box with him," it was held that they were not actiona-

It has been held, that to accuse another of having forsworn himself, generally, is actionable (*a*) ; but it seems to be now perfectly settled, that the term is not actionable, unless it appear from the accompanying circumstances to have been meant and understood of such a forswearing as would constitute the offence of perjury (*b*). [1]

Thus, to say (*c*), "A. B. being forsworn, compounded the prosecution," is actionable, for an indictable forswearing must have been intended [2].

So the term "forsworn" is actionable when reference is made to a court (*d*) in which false swearing would amount to perjury.

ble without averments to show that they were spoken in reference to the conduct of the plaintiff as a juror. *Hall v. Weedon*, 8 D. & R. 140.

In an action of slander for words charging a party with being *forsworn*, the words though not actionable *per se*, may be rendered so by alleging and proving a *colloquium*, that the words were spoken in reference to testimony given by the plaintiff in an action depending in a judicial tribunal, in which the plaintiff was sworn as a witness. It was formerly held necessary to the maintenance of such an action that it should be alleged and proved, that the court in which the trial was had possessed jurisdiction of the subject matter, and had authority to administer an oath ; and that the evidence given by the plaintiff was material to the issue on trial. Now it is held otherwise. The authority to administer the oath, and the materiality of the testimony in respect to which the charge is made, *will be presumed until the contrary be shown*. Whether such presumption can even be rebutted by proof may well be doubted, for if the charge would naturally be understood by the hearers to impute the crime of perjury, and there be nothing to induce the belief that the swearing spoken of was extra-judicial, or that the evidence was immaterial, no reason is perceived why the presumption should be allowed to be rebutted by proof. The intent of the defendant, unless communicated to the hearers, does not affect the question. It is believed that there is no decision by the English Courts, requiring proof of the materiality of the evidence charged to be false, in order to sustain the action. On the trial of an indictment for perjury such proof is indispensable. See the following cases ; *Coons v. Robinson*, 3 Barbour's Law R. 655 ; *Jacobs v. Tyler* 3 Hill 572 ; *Price v. Power* 12 Wendell, 502 ; 16 Wendell, 451. S. C. in error ; *Butterfield v. Buffum*, 9 New Hamp. R. 156 ; *Coleman v. Godwin*, 3 Doug. 91 ; *Dalrymple v. Lofton*, 2 McMullan So. Car. R. 112 ; *Harris v. Purdy*, 1 Stewart's Alab. R. 231.

(*a*) 2 Buls. 40.

(*b*) 4 Rep. 15. 2 Buls. 150. *Holt v. Scholefield*, 6. T. R. 691.

(*c*) Cro. Eliz. 609. 2 Rol. Rep. 410.

[1] See note [1] p. 22, *ante*. (*d*) Cro. Eliz. 720. 1 Vin. Ab. 406. pl. b. 7.

[2] "You swore to a lie, for which you now stand indicted," held actionable. *Pelton v. Ward*, 3 Caines 73.

The defendant said, "Arthur (*e*) Colome is a forsworn man, and hath taken a false oath in his deposition at Tiverton, where he waged his law against me;" and the plaintiff had judgment, the [*89] "forswearing appearing by the description to have amounted to perjury.

So to say, "Thou wert forsworn at such a trial (*f*)," (with reference to a trial where the offence of perjury might have been committed) is actionable.

Where reference is made to a particular court, the imputation is actionable, if perjury could have been committed there. In such case, however, it is incumbent on the plaintiff to show that the perjury could have been committed there [1].

The defendant said, "Thou (*g*) wert forsworn at Whitechurch court," and the words were held not to be actionable, because it did not appear that Whitechurch court was a court of record.

So it was held, that no action lay for saying, "He (*h*) has forsworn himself in Leake court, without shewing it to be a court which could compel the taking of an oath.

It is not necessary that the forswearing should be shown to have been intended of a perjury within the statute of Elizabeth, for perjury is an offence punishable at Common Law (*i*). So, [*90] although Ecclesiastical Courts are not mentioned in the statute of Elizabeth against perjury, yet an action lies for imputing a forswearing in an Ecclesiastical Court [2]. The defendant said, "Thou (*j*) art a forsworn knave, and I will prove thee to be

(*e*) Cro. J. 204.

(*f*) Cro. Car. 378. Lut. 1292.

(*g*) Cro. Car. 378.

(*h*) 1 Rol. Ab. 39. pl. 7. 6. Bac. Ab. 207.

(*i*) 1 Rol. Ab. 49.

(*j*) Shaw v. Thompson, Cro. Eliz. 609.

[1] Although the plaintiff had omitted to aver *jurisdiction* in the court before which the oath was taken, the declaration was held sufficient on motion in arrest after verdict; Niven v. Munn, 13 Johns. R. 48. So "you swore false *in court*," was held sufficient without a colloquium on like motion; Hamilton v. Dent, 1 Hayw. (N. C.) R. 116; and under like circumstances the words "you swore false at the trial of your brother John," were held sufficient; Fowle v. Robbins, 12 Mass. R. 496.

[2] In Chapman v. Gillet, 2 Conn. R. 40. it was held that an action lay for charging the plaintiff with *perjury*, in giving testimony before a church judicatory in Connecticut: so held by six judges—three dissenting.

forsworn in the Spiritual Court ;” and it was held that the action well lay ; for the Ecclesiastical Court is a judicial court, and well known (*k*).

To say, “ Thou (*l*) wast forsworn before my Lord Chief Justice, in evidence,” is actionable.

So to say that another is forsworn before a Justice (*m*) of the Peace is actionable ; or before such a person, naming him, provided it can be shown with certainty, that the person so named, was a Justice of the Peace.

The defendant said, “ Thou (*n*) art a forsworn knave !” The plaintiff asked, “ Where ?” The defendant replied, “ In Ilston court ;” and the words were held to be actionable, the court alluded to being a Court Leet, where the offence might have been committed.

“ Thou (*o*) art a forsworn man ; I will teach *thee the [*91] price of an oath, and will set thee on the pillory.” And the words were held to be actionable, because the defendant showed that he meant to impute a perjury, for which the plaintiff ought to stand in the pillory [*a a*].

The injurious import of the term *stealing*, has undergone much discussion.

In *Baker (p) v. Pierce*, the words were, “ You stole my boxwood, and I will prove it.” Upon motion in arrest of judgment, a long string of cases was cited for the defendant, in which the term stealing had not been considered as actionable ; as where the defendant said, “ You (*q*) are a thief and stole my timber.” “ You (*r*) are a thief and stole my corn, hops and apples,” “ You (*s*) stole timber out of my yard.” “ You (*t*) stole corn out of my yard.” All of

(*k*) But it has been held in a late case, that an indictment does not lie in respect of a false oath before a surrogate. *R. v. Foster*, Russ. and Ry. C. C. R., 459. But now see the Stat. 4. G. 4. c. 76. s. 14.

(*l*) Le. 127.

(*m*) *Gurneth v. Derry*, 3 Lev. 166. 4 Co. 17.

(*n*) Cro. Eliz. 720.

(*o*) 1 Vin. Ab. 407, pl. 11.

[*a a*] To say “ he has defrauded a mealman of a roan horse, is not actionable, it not being said to have done by a false pretence, or in any criminal way.” *Richardson v. Allen*, 2 Chitt. C. T. M. 652.

(*p*) 6 Mod. 23.

(*q*) Cro. J. 65.

(*r*) 2 Brownl. 280.

(*s*) Cro. J. 673. All. 31. Hob. 331. Sty. 231.

(*t*) Hob. 406.

which had been decided upon the ground, that unless the additional words show that a charge of felony was intended, they are to be taken in their mildest acceptation.

For the plaintiff, it was contended, that "You have stolen my timber," is actionable; for it must be felled and severed
[*92] from the stock, before *it is timber, according to the distinction made in the old hexameter:—

"Arbor dum crescit, lignum dum crescere nescit (t)."

Holt, C. J. said, "The opinions of later times have been in many instances different from those of former days in relation to words; for formerly there has been a difference taken between saying, 'Thou art a thief, *and* hast stolen my wood;' and, 'Thou art a thief, *for* thou hast stolen my wood.' And judgments have gone both ways; but later opinions make no difference if the words be spoken at the same time. And these are scrambling things that have gone backwards and forwards, and the idle people in the country, that privately cut and carry away coppice wood, are in common parlance, called 'woodstealers.'" And he said, that, "Stealing, and feloniously stealing, are not the same; for in common parlance, stealing does not always import 'felony;' as to cut and carry away furze is a stealing, but not a felonious stealing."

But Powell, J. said, he always took it, that stealing, *ex vi termini*, did import felony. And afterwards, by the opinion of the whole court, the plaintiff had judgment, on the ground, as stated in the report, of all the later authorities (u).

[*93] *From this, and the later decisions upon this subject, it seems, that the term stealing takes its complexion from the subject matter to which it is applied, and will be considered as intended of a felonious stealing, if a felony could have been committed of such subject matter [1].

(t) 1 Rol. Ab. 70. pl. 47.

(u) 6 Mod. 23.

[1] In *Dexter v. Taber* 12 Johns. R. 239, the words were, "You are a thief; you stole hoop poles and saw logs from off Delancey's and Judge Myer's land." The judge instructed the jury that if the defendant meant to charge the plaintiff with taking timber *already cut into poles and logs*, the words were actionable; but if he only meant to charge the cutting and carrying away timber with a view to convert it into poles, &c. the words were not actionable. The jury found for the defendant, and the Court refused to set aside

In modern construction and practice little doubt can arise upon these niceties which appear in former times to have afforded abundant occupation to the courts. If, from the plaintiff's declaration, it appear, that the charge of stealing could not, from its application, have been meant to impute a felonious stealing: as if, for example, the defendant had said, "You stole an acre of my land;" the statement would be held to be bad upon demurrer; if it appeared upon the trial that the term had been applied in a sense not felonious, the plaintiff would be nonsuited; and finally, if after verdict for the plaintiff, it appeared, that the term as used was *capable* of a felonious sense, the verdict would be supported.

This doctrine is applicable to every other case where doubtful words, or even those apparently innocent, derive a criminal quality, either from context or collateral circumstances.

The defendant said, "Thou (*x*) art a clipper, *and [*94] shall be hanged for it;" and the court, after a verdict for the plaintiff, said, that the words should not be taken to mean a clipping of clothes, but a clipping of money, for which the plaintiff might be hanged.

So for the words, "Thou (*y*) art a clipper, and thy neck shall pay for it," an action was held to be maintainable; for by the subsequent words it could not be intended of any other clipping than of money.

So when the statutes against witchcraft were in force, the defendant said, "Thou (*z*) art a witch, and I will make thee suffer for a witch." After verdict for the plaintiff, it was contended, that the words were not actionable; that it had been many times adjudged that *witch* alone is not actionable; and that, "I will make thee suffer for a *witch*," are not; for it is not said suffer death; that it might be intended of a citation in the Spiritual Court, which was the

the verdict; SPENCER J. dissented. See his dissenting opinion and also *Stokes v. Stuckey*, 1 McCord, 562.

In *Findlay v. Bear*, 8 Serg. & Rawle 571, it was held that a charge of having stolen a *dog* is not actionable; for the reason that a dog is of that kind of property of which felony cannot be committed; and yet for killing a dog without good cause, an action lies. See *Hinckley v. Emerson*, 4 Cowen 351.

(*x*) *Walter v. Beaver*, 3 Lev. 166. 2 Jo. 235. Cro. J. 255. 276. 1 Lev. 155.
(*y*) 3 Lev. 166. (*z*) 3 Lev. 394.

usual way before the statute; or it might be by ducking in the water as the common people used to try those suspected of witchcraft. But it was answered by Rokesby and Neville, Justices, that the words shall be taken as they are usually understood among neighbors in the country; to suffer is intended to suffer [*95] death; as they usually *say, How many suffer at this Assizes? which is intended, suffer death. And thereto Treby, C. J. after it had been twice moved, inclined. And at last judgment was given for the plaintiff by Treby, C. J., and Rokesby and Neville, Js.; Powell, J being of a contrary opinion, because words shall be taken in *mitiori sensu*, and the word suffer is wholly uncertain what manner of suffering was intended.

The defendant (*a*), speaking of the death of one Daniel Dolly, said to the plaintiff, "You are a bad man, and I am thoroughly convinced that you are guilty; and rather than you should want a hangman, I would be your executioner." After verdict and judgment for the plaintiff, the defendant brought a writ of error in the court of King's Bench, assigning as two grounds of error,—

1st. That the words were not in themselves scandalous.

2dly. That they did not become so by reference to the death of D. D.

Lord Mansfield, in affirming the judgment, observed, "It is argued that there are many innocent ways by which one man may occasion the death of another; therefore, the words, [*96] 'guilty of the death,' do not in themselves *necessarily import a charge of murder; and consequently, as no particular act is charged (which in itself amounts to an imputation of a crime) the words are defectively laid. What! when the defendant tells the plaintiff that he has been *guilty* of the death of a person, is not that a charge and imputation of a very foul and heinous kind? Saying that such a one is the cause of another's death, as in the case in 2 Buls. 10, 11, is very different; because a physician may be the cause of a man's death, and very innocently: but the word *guilty* implies a malicious intent, and can be applied only to something which is universally allowed to be a crime.

But the defendant does not rest here: on the contrary, in order to explain his meaning, he goes on and says, ‘and rather than you should be without a hangman, I will hang you.’ These words plainly show what species of death the defendant meant, and therefore in themselves manifestly import a charge of murder.”

Where the words merely charge the plaintiff with being *deserving of punishment*, great doubt seems to have been entertained whether they are actionable, and there are many authorities both ways.

It has been held, that an action lies for saying, “If (b) you had your deserts, you had been ‘hanged before now.’” For the court said, it should be intended to convey an imputation of an offence for which the penalty of death was due.

So the words, “He (c) hath deserved to have his ears nailed to the pillory,” were adjudged to be actionable. But for the words, “Thou (d) art a scurvy bad fellow, and hast done that for which thou deservest to be hanged;” it was held, that no action could be maintained. So it has been held, that the words, “Thou (e) shouldest have sate on the pillory, if thou hadst thy deserts,” were not actionable, because too general.

As a greater degree of precision has been required in modern times than formerly, the cases last cited may, perhaps, be considered as the better authorities.

If, however, the words import a conviction for some offence, it seems they are actionable.

The defendant said, “You (f) are a branded rogue, and have held up your hand at the bar.”

It was held, that the words were actionable, since they imply that the plaintiff was branded according to the statute (g).

So words or signs *apparently innocent or unintelligible*, may, by explanatory circumstances, become actionable. The defendant said of the *plaintiff, “He (h) is a healer of [*98] felons;” and the words having been spoken in one of the

(b) Cro. Eliz. 62.

(c) Cro. Eliz. 384.

(d) 1 Vin. Ab. 415. pl. 5.

(e) Vin. Ab. 415. pl. 10. Mo. 243.

(f) All. 35.

(g) 1 Jac. c. 7.

(h) Hob. 126. Cro. Eliz. 250. Cart. 214.

western counties, wherein "a healer of felons" signifies a concealer of felons, were, thus explained, held to be actionable.

So the words, "He (*i*) is mainsworn," were held to be actionable, as published in a part of the kingdom where they were understood to convey a charge of perjury.

So, generally, in regard to words spoken in a foreign language, the only question is, whether they were understood by the hearers in an actionable sense?—If so understood, the mischief is effected, and the cause of action complete (*k*).

Where the words are spoken in the Welsh language, but in an English county, it must appear, that the hearers understood Welsh; for otherwise the court will not intend that any there understood the Welsh tongue; and then it was not any slander any more than if any one spoke slanderous words in French or Italian; in which case no action will lie, unless it be averred, that some one there (*l*) understood the language in which the alleged slander was conveyed.

And as doubtful or apparently innocent words may [*99] *by circumstances, be shown to be actionable; so may words *apparently actionable* be explained, by circumstances, to have been intended and understood in an innocent sense. Thus, though the defendant should say, "Thou art a murtherer," the words would not be actionable, if the defendant could make it appear that he was conversing with the plaintiff concerning unlawful hunting, when the plaintiff confessed that he killed several hares with certain engines, upon which the defendant said, "Thou art a murtherer," meaning a murtherer of hares so killed (*m*). [1] [*a a*]

(*i*) Hob. 126.

(*k*) 1 Roll. Ab. 74. Cro. Eliz. 496.

(*l*) Cro. Eliz. 865.

(*m*) 4 Co. 13.

[1] So where an action was brought for calling the plaintiff an *highwayman*, *robber* and *murderer*, and it was shown that the words were spoken in reference to a transaction in respect to which the opprobrious epithets were wholly inapplicable, and were understood by the by-standers to relate to that transaction, it was held that an action could not be sustained. *Van Rensselaer v. Dole*, 1 Johns. Cas. 279.

Although the words be not actionable when the hearers understand the facts in reference to which the words are spoken, as where a party is charged with having killed the wife of the speaker, when all the hearers know that she

Formerly a distinction was taken between saying, "Thou art a thief, *for* thou hast stolen such a thing," as a tree, the taking of which could not be felonious, and the saying, "Thou art a thief, *and* hast stolen such a thing;" since in the former case the subsequent words show the reason of calling the plaintiff a thief, and that no felonious imputation was meant; but in the latter, the action lies for calling him a thief, and the addition "thou hast stolen," is another distinct sentence by itself, and not the reason of the former speech, nor any diminution thereof (*n*).

*Little stress, however, would probably be now laid [*100] upon this distinction, as, in common discourse, *and* is frequently intended to mean *for*.

And even in the construction of legal instruments, instances are not unfrequent, where the vulgar and obvious acceptation of the word has been preferred to its strict grammatical signification (*o*).

Brittridge brought an action for these words, "Mr. Brittridge is a perjured old knave, *and* that is to be proved by a stake parting the land of H. Martin and Mr. Wright." And upon motion in arrest of judgment, it was held, that although the words, "thou art a perjured knave," without any more, would have been actionable; yet that upon all the words taken together, no action lay; for the latter words extenuate the former, and explain his intent, that he did not mean any judicial perjury; and therefore it was adjudged that the words were not actionable. But it was said, that if the plaintiff's

is living; they are actionable if the hearers do not understand the circumstances rendering the words innocent. In such case the secret intent of the speaker is immaterial, *Henry and wife v. Power*, 10 Meeson & W. 561; *Hanklason v. Bilby*, 16 Id. 442. See also 1 *Bailey*, 595; 3 *Dana*, 138; 5 *New Hampshire*, R. 203.

[*a a*] The words, "I think the business ought to have the most rigid inquiry, for he murdered his wife, that is, he administered improperly medicines to her for a certain complaint, which was the cause of her death," were held to be actionable, as importing at least a charge of manslaughter; and though the words were doubtful, the doubt would be cured by the finding of a jury, that they were meant in that sense. *Ford v. Primrose*, 5 D. and R. 289.

(*n*) *Cro. J.* 114. *B. L. N. P.* 5. *Hob. Rep.* 106. *Cro. Eliz.* 857. *Hob.* 77. *Brownl.* 2 *God. b.* 241. *Hard.* 7. *All.* 31. *Sty.* 66.

(*o*) 6 *East*, 486. *Mo.* 422. 1 *Wils.* 140.

counsel had disclosed the truth of the case in the declaration, the words would have maintained the action ; for the truth of the case was, that in an action between Martin and Wright, the state of the controversy was, whether the stake stood upon the land of [*101] the one or the other, or indifferently as a boundary *between their lands. And in that action the plaintiff was sworn as a witness ; and, by the pretence of the plaintiff, had perjured himself. But this special matter was not disclosed, and therefore it was decided for the defendant (p).

Sir Edward Coke, in his fourth report, observes, that, “ In case of slander by words, the sense of the words ought to be taken, and the sense of them appears by the cause and occasion of speaking of them ; for, “ *Sensus verborum ex causâ dicendi accipiendus est.*”

And again, “ God forbid that a man’s words should be, by strict and grammatical construction, taken by parcels against the manifest intent of the party, upon consideration of all the words which import the true cause and occasion, which manifest the true sense of them.” Thi rule is so clear, and so well established, that any further illustration of it would be nugatory ; and the questions which may arise, upon which party shall the *onus* of proving or disproving the injurious intention and meaning be imposed ; and how shall the defendant best avail himself of explanatory circumstances in his favour, will be afterwards considered under more appropriate divisions.

3dly. From the mere description of the circumstances constituting the offence.

[*102] *In the older cases, much difficulty prevailed with respect to the actionable quality of words which contained a mere enumeration of circumstances : it was frequently doubted, in the first place, whether the circumstances, supposing them to be true, constituted an indictable offence ? in the second, whether the imputing such a misdemeanor was a sufficient ground of action ?

The affirmative of the latter question has already been attempted to be shown. With respect to the first part, it may be proper to advance a few observations.

In considering the class of cases referable to this head, where offences have been charged not amounting to, but connected with, felony, it will be convenient to distribute them into imputations charging,

An *attempt* to commit a crime.

A *solicitation* to commit a crime.

Some *preparation* made in *contemplation* of the commission of a crime.

As to words charging an *attempt* to commit a crime.

In the case of *Sir (q) Harbert Croft v. Brown*, Coke, C. J. observed, that, in ancient time, "*voluntas reputabatur pro facto*;" and that if a "person lay in wait to kill an- [*103] other, and upon his resisting, wounded but did not kill him, it amounted to a felony at Common Law, and the offender was ousted of his clergy; the intention, manifested by an overt act, constituted a felony.

The learned judge then proceeded to intimate, that any words charging an overt act done in pursuance of a felonious intention, would be actionable. But that in the principal case, the words, "He keepeth men to rob me," were not actionable, since they did not charge any waylaying or overt act done.

But the words, "He (r) sought to murder me, and I can prove it," were held to be actionable.

In this case it may be observed, the words imported more than a mere inclination to murder; since the term *sought* is shown by the latter words to refer to some overt act capable of proof.

But the words, "Thou (s) wouldest have killed me," it was held that no action lay, since intention only was charged.

In *Muney's case (t)*, Coke, C. J. and Houghton, J. held that the words, "Thou art a knave, *and hast laid [*104] in wait to kill me; and thou hast hired one W. to kill me," were not actionable, because *no act* was laid to be done, but an intention only; and that a mere intent is not punishable.

(q) 3 Buls. 167.

(r) Cro. Eliz. 308.

(s) Dr. Poe's case, vid. 2 Buls. 206. 1 Vin. Ab. 440. pl. 9.

(t) 2 Buls. 206.

It is remarkable, that the lying in wait, and hiring an assassin to murder another, should be considered as nothing more than mere intention; and this decision seems to be very inconsistent with the subsequent doctrine of Lord Coke in *Sir Harbert Croft's* case (*u*); notwithstanding therefore, this and some other contradictory authorities, it may be collected from a general view of the cases, that the charging any attempt to commit a felony is actionable, for such an attempt constitutes an indictable offence (*x*).

Where the words charge a *solicitation* to commit a crime.

The defendant said, "Mrs. Margaret Passie sent a letter to my Mr. and therein willed him to poison his wife." After judgment for the plaintiff it was assigned for error, that the words were not actionable; because they did not charge any act done; and that it was not like charging the plaintiff with lying in wait to commit a murder; but all the justices and barons, besides Kingsmill, held, that the action lay (*y*).

[*105] "The defendant said, "Tibbot (*z*) and one Gough agreed to have hired a man to kill me." And judgment was given for the plaintiff by Wray, C. J. and Fenner, J. against the opinion of Gawdy.

The defendant said, "You (*a*) set on folks to murder J. S." And Wylde, J. conceived the words to be actionable, since the offence was indictable.

The defendant said, "John (*b*) Leversage would have robbed the house of J. S. if J. D. would have consented unto it. He persuaded J. D. unto it and told him he would bring him where he should have money enough." And although it was objected in arrest of judgment, that the plaintiff could receive no prejudice from the words, which did not impute any act done, the plaintiff had judgment.

The defendant said, "He (*c*) bade J. S. to steal what goods he could, and he would receive them." And it was held, on motion in arrest of judgment, that the words were not actionable, since they merely charged the giving bad advice, and no act done.

But in *Lady Cockaine's* case (*d*), a charge of having so-

(*u*) 3 Buls. 157.

(*x*) 2 East, 6.

(*y*) Cro. Eliz. 747, cited by Williams, J. Buls. 201.

(*z*) Cro. Eliz.

(*a*) West v. Phillips, Keb. 253.

(*b*) Cro. E. 710.

(*c*) 2 Jo. 157.

(*d*) Cro. E. 49.

licited another to commit a felony, *was held to be actionable. [*106] And in *Sir Harbert Croft's* case (*e*) it was held, that to say, "A. did hire a man to rob me," would be actionable.

Where the words charge some *preparation* made in contemplation of the commission of a crime.

When a man does an act in itself indifferent, but in contemplation of the commission of crime in future, (as the act is not indictable,) an imputation of it can scarcely be considered as actionable. As if, for instance, a person were to purchase a pistol, with the intent to commit murder at a future opportunity, the act would not, in law, amount to an indictable offence, though it might be a good ground for binding the party to his good behavior (*f*). It is to be observed, however, that in *Lady (g) Cockaine's* case, the words charging her with having solicited a pregnant woman to kill her child, were held actionable; because, if true, there was cause to bind her to *her good behavior*. The words, however in that case, were clearly actionable *upon another ground, and the reason [*107] given is insufficient, since it appears, from a variety of decisions, that many imputations for which, if true, the party might be bound to his good behavior, are not actionable.

The defendant said, "He (*h*) keepeth men to rob me." And it was held, that the words were not actionable.

After some conversation about robbing a house, the defendant said, "It (*i*) was T. M. (the plaintiff) and J. D. that were about to rob E. C.'s house." After verdict for the plaintiff, it was adjudged by Archer and Vaughn, J. for the defendant. And it was said, that the *going with the intent to lie in wait* to kill a man was not indictable; but that the *lying in wait* with the same intent was indictable.

Upon the whole it seems, that where the words merely impute an

(*c*) 3 Buls. 167. *So per Grose, J. 2 East, 20, an action lies for charging the plaintiff with having solicited a servant to steal the goods of his master.

(*f*) But it has been held, that the procuring counterfeit coin with intent to circulate it, is an indictable offence. *R. v. Fuller*, R. & M. C. C. 308.

(*g*) Cro. E. 49

(*h*) 3 Buls. 167.

(*i*) Freem. 46.

act done in contemplation of the future commission of a crime, they are not indictable, unless it appear that the defendant intended to charge the plaintiff with having solicited, or conspired with, others for the purpose of committing the crime.

Where the description of the circumstances is precise, little doubt can arise. The defendant said, "You (*k*) have [*108] caused this boy to perjure *himself." And the words were held to be actionable, since the facts charged constitute the offence of subornation of perjury.

So where the defendant said, "You (*l*) have bought a roan stolen horse, knowing him to be stolen."

The defendant said, "He (*m*) came to my door and set a pistol to my breast, and demanded money of me; and I, for safeguard of my life, gave him what money he desired." Roll. C. J. observed, if the words sound to charge him with felony, the action will lie; and three of the Justices decided for the plaintiff.

The defendant said of a justice of the peace and deputy lieutenant for the county of Warwick, "I have heard that a maid of J. K.'s should report, that he being sick and she looking through a hole of the door where he then lay, saw a priest (innuendo, a popish priest) give the eucharist and extreme unction to Sir J. K." It was moved in arrest of judgment, that these words did not amount to calling him a papist; since it did not appear that the priest was a popish priest, unless by innuendo. But it was, after two arguments, resolved, that the words taken altogether [*109] were actionable, and explained one *another; that a priest who gives the extreme unction must be a popish priest, and he that receives it a papist; and the judgment given for the plaintiff in the Common Pleas, was afterwards affirmed in the King's Bench (*n*).

The defendant said, "Thou (*o*) didst violently, upon the highway, take my purse from me, and four shillings and two pence in it: and didst threaten me to cut me off in the midst, but I was

(*k*) Brownl. 2. (*l*) Brigg's case, God. 157. (*m*) Neve v. Cross, Sty. 350.

(*n*) Sir John Knightly v. Marrow, 3 Lev. 68.

(*o*) Lawrence v. Woodward, Cro. Car. 177.

forced to run away to save my life.” And the words, which in fact amount to a description of a highway robbery, were held to be actionable.

III. That the criminal act was meant to be imputed to the *plaintiff*.

The application of the injurious charge to the plaintiff may be collected, generally, from any circumstances which indicate the intention of the defendant, so to apply his words, and which induced the hearers to suppose that the plaintiff was the person meant.

Thus, if the defendant should say, “ I (*p*) know what I am, and I know what the plaintiff is : I never did such an act,” (specifying some criminal act,) the words would be *act- [*110] ionable, provided the hearers understood the offence to have been imputed to the plaintiff by such words.

Where a charge has been imputed to one of several, without specifying him, it has been held in many of the older cases, that no action was maintainable by any of them. The defendant said to three men who had given evidence against him, “ One (*q*) of you is perjured.” And upon an action brought by one of them, it was adjudged, that no action lay.

And so it has been held, that for the words, “ One of my brothers is perjured.” Although one of the brothers should bring an action, and aver that the words were spoken concerning him, yet, on account of the apparent uncertainty, no action would be maintainable (*r*). [1]

But it has since been held, that for the words “ A. (*s*) or B. murdered C.” either A. or B. might bring an action.

If from the plaintiff’s statement it appear that he *could have been*

(*p*) 2 Lev. 150. *Snell v. Webling*, 1 Vent. 276. (*q*) Cro. Eliz. 479.

(*r*) Per Tanfield, J. in *Wiseman v. Wiseman*, Cro. J. 107.

(*s*) 10 Mod. 196. Cart. 56.

[1] In *Gidney v. Blake*, 11 Johns. R. 54, the uncertainty was as great as in the case mentioned in the text, and yet the action was held to lie. The words were, “ your children are thieves.” The declaration stated a *colloquium* with the father of the plaintiff, of and concerning his children, and of and concerning he plaintiff. See 4. Co. 17. b.

meant, the finding of the jury for him will be conclusive as to the defendant's application of the charge to him, for otherwise they could not have given him damages.

[*111] The application to the plaintiff may be *ascertained by a variety of circumstances; as from his having been (*t*) the subject of previous (*u*) conversation, or from his being described by name, or by any other means which are sufficient to induce the hearer to apply the offensive imputation to the plaintiff.

The plaintiff was a justice of the peace, and *Receiver* of the Court of Wards, and by reason thereof received great sums of money for the king, and was used with much confidence by the king; and the defendant, speaking concerning him with one Thomas Whorewood, spoke these words, "Mr. (*x*) *Deceiver* hath deceived the king." After a verdict for the plaintiff, the court, on motion in arrest of judgment, held, that the action well lay; that the words "Mr. Deceiver," were an ironical allusion and nickname to his office and place; and that if such crafty evasions should be admitted, it would be an usual practice to slander *sans* punishment.

If A. B. say to C. D. before whom E. F. is walking, "He (*y*) that goeth before thee is perjured," an action lies, if it appear that none but E. F. was walking before C. D. at the time of speaking.

[*112] In the case of *J'Anson* (*z*) v. *Stuart*, the plaintiff was thus described in the libel:—"This diabolical character, like Polyphemus the man-eater, has but one eye; and is well known to all persons well acquainted with the name of a certain noble circumnavigator (meaning by the last mentioned words to allude to the name of the plaintiff, *J'Anson*.)"

From these (*a*) and a number of similar instances, it may be laid down as a general rule, that the application of the words to the

(*t*) 1 Rol. Ab. 85. 1 Rol. Ab. 75.

(*u*) Cro. J. 557. 6 Bac. Ab. 231.

(*x*) Sir Miles Fleetwood v. Curl, Cro. J. 557.

(*y*) 1 Rol. Ab. 81.

(*z*) 1 T. R. 748.

(*a*) Cro. Eliz. 497. Cro. J. 444. 2 Barnard. Rep. Hughes v. Winter. Keb. 525.

plaintiff is a matter to be collected by the jury, from the particular circumstances of each case.

The difficulties which occur upon this point, are generally of a technical nature, and consist in the doubt, whether the plaintiff has so stated his case in the declaration as to show that the conclusion could properly be drawn: the consideration of these, however, belongs to a subsequent division of the subject.

CHAPTER II.

WHEN AN INFECTIOUS DISORDER IS IMPUTED.

ANOTHER branch of cases where the law allows an action to be maintained, without special damage, consists of those *where a person is charged with having an infectious disease, the effect of which imputation, if believed, would be to exclude him from society. [*113]

It has been said (*a*), that, "Since man is a being formed for society, and standing in almost constant need of the advice, comfort, and assistance, of his fellow creatures, it is highly reasonable that any words which import the charge of having a contagious distemper should be in themselves actionable ; because all prudent persons will avoid the company of one having such a distemper.

As the ground of proceeding is the presumption that the plaintiff will be wholly or partially excluded from society and its comforts, the action is consequently confined to the imputing those disorders which are so infectious in their *nature [*114] and pernicious in their effects, as to render the person afflicted an object likely to be shunned and avoided.

Actions for words of this description seem, in the absence of special damage, to have been confined to charges of leprosy and lues venerea. For though it was held, that an action lay for saying,

(*a*) 6 Bac. Ab. 212.

“He (*b*) buried people who died of the plague in his house,” it appears that special damage was laid and proved.

There is, however, one case in which it has been held, that to charge another with having the “falling (*e*) sickness,” is actionable.

So great, formerly, was the dread of leprous contagion, that an especial writ was proved for the removal of the infected object to some secluded place, where he might no longer be a terror to society: happily this writ has long lost its use.

It seems, however, that though the reason has in some degree ceased to operate, an action will, even at this day, be sustainable for a charge of either of the diseases (*d*) alluded to.

From the case of *Villars and Monsley* (*e*), it appears, that to say another has the *itch*, is not *actionable; [*115] though such an accusation would be actionable if written. It is to be remarked, that in the above case, both Wilmot, C. J. and Gould, J. seem to take for granted, that to impute the *plague* is actionable; but no case was cited in which this point has been expressly determined.

The ground of the action being the presumption of the plaintiff's exclusion from society, no action will lie for an imputation in (*f*) the past tense, for such an assertion does not represent the plaintiff, at the time of speaking, to be unfit for society, and therefore the substance of the action is wanting; and it was observed, in the case of *Carslake v. Mapledoram* (*f*), that this doctrine was justified by all the cases, except one, and that loosely reported.

With respect to the terms in which the imputation is conveyed, as in other cases, they may either expressly and by their own power impute the disease, or by the aid of collateral circumstances may render the implication unavoidable.

Thus, to say (*g*) a man has the leprosy, or to call him leprous knave, is actionable: the term leper being in itself a clear and unequivocal designation of the speaker's meaning.

(*b*) Kit. 173. b. 1 Com. Dig. 252.

(*c*) 1 Rol. 44. 1. 7.

(*d*) *Carslake v. Mapledoram*, 2 T. R. 473.

(*e*) 2 Wills. 403.

(*f*) *Carslake v. Mapledoram*, 2 T. R. 473. Str. 1189.

(*g*) 2 T. R. 473. Cr. J. 144.

[*116] *Without citing the disgusting string of cases upon this subject, with which the older reports abound, it may be deemed sufficient to observe, that wherever it can be collected from the circumstances, that the speakers intended the hearers to understand that the person spoken of was at the time of speaking, afflicted with either of the disorders above mentioned, an action may be maintained. And the meaning may be evidenced either by reference to the mode in which the disease was communicated, the symptoms (*h*) with which it is attended, its effects upon the person (*i*) or constitution, the means (*k*) of cure, the necessity of avoiding (*l*) the person infected; or, in short, by any other allusion capable of conveying the offensive imputation.

(*h*) Holt. 563.

(*i*) Cro. J. 430. 144. 1 Vin. Ab. 488. Cro. Eliz. 214. 289.

k) Cro. J. 430. Cro. Eliz. 648. Roll. Rep. 420. (*l*) Cro. J. 430.

CHAPTER III.

WHERE THE IMPUTATION AFFECTS A PERSON IN HIS OFFICE, PROFESSION, OR BUSINESS.

NEXT to imputations which tend to deprive a man of his life, or liberty, or to exclude him from the comforts of society, may *be ranked those which affect him in his office, profession, or means of livelihood. [*117] To enumerate the different decisions upon this subject would be tedious, and to reconcile them impossible ; yet they seem to yield a general rule, sufficiently simple and unembarrassed ; namely, that words are actionable which directly tend to the prejudice of any one in his office, profession (a), trade, or business.

Observations upon this class of cases may be divided into those relating to the *grounds of the action*,—*the extent of the action*,—and *the degree of certainty and precision requisite to render the words actionable*.

Words which affect a person in his office generally are actionable, whether the office be merely confidential and honorary, or be productive of *emolument. The ground of action in [*118] the two cases, seems, however, to be somewhat different. Where his office is lucrative, words which reflect upon the integrity or capacity of the plaintiff render his tenure precarious, and are therefore *pro tanto* a detriment in a pecuniary point of view ; but where the office is merely confidential, the presumptive loss of emolument cannot supply the ground of action.

(a) 3 Wils. 186.

The whole class of cases in which magistrates and others (whose offices are merely confidential and honorary) have been allowed to recover a pecuniary compensation for words relating to their official character, seems to rest upon more dubious principles than any other in which a remedy is given without proof of some specific loss. For as even the loss of office itself would not be attended with any loss of emolument, such as would naturally result from deprivation of liberty, or exclusion from society, the evil seems scarcely to admit of pecuniary admeasurement. Besides, the bad consequences which arise from degrading the magistracy, are of a public nature, and are therefore rather a matter of criminal than of civil cognizance, especially as the damages in a civil action are not considered to be of a penal nature, but are given as a private compensation to the party injured. It has long, however, been fully [*119] established, that words are equally actionable *whether the office or profession to which they relate be lucrative or merely confidential.

So that words spoken of Justices of the Peace, or physicians, or barristers, are frequently actionable, although the office of the first be merely confidential, and the latter are not in legal contemplation entitled to demand the payment of fees [1.] Where the office is simply confidential, a singular distinction has been taken between words imputing want of *ability* in the holder, and those which charge him with want of *integrity*.

It has been held, that to charge a person in such an office with any corruption, or with any ill design or principles, is actionable; but that to represent him as wholly incompetent, in point of ability, to hold the office, is not a slander for which an action is maintainable. The reason assigned for the distinction is so remarkable, that it may be proper to give it in the very words of Lord Holt.

He says (*b*), “ It has been adjudged, that to call a Justice of the

(*b*) *Howe v. Prinn*, Holt, 653. Salk. 694.

[1] In New-York it is held by the courts that both physicians and barristers or counsel may maintain suits at law for the recovery of their fees; *M'Pherson v. Cheadell*, 24 Wendell, 15; *Finch v. Gridley's exrs.* 25 Id. 469; *Stevens and Cagger v. Adams*, 23 Wendell 57, and 26 Id. 451 S. C.

Peace, blockhead, ass, &c. is not a slander for which an action lies, because he was not accused of any corruption in his employment, or any ill design, or principle; and it was not his fault that he was a blockhead; for he cannot be otherwise than his Maker made him; *but if he had been a wise man, and wicked [*120] principles were charged upon him when he had not them, an action would have lain; for though a man cannot be wiser, he may be honester than he is. If a person be in a place of profit, and he is accused of insufficiency, he shall have remedy by action.

'Tis otherwise if he be only in a place of honour; though even there, if he is charged with ill principles, and as disaffected to the government, he shall have an action for such scandal to his reputation."

In the case of *Onslow (c) v. Horne*, L. C. J. De Grey, in giving judgment, observed, "It was objected at the bar, on the side of the defendant, that words spoken of an officer, or magistrate, are not actionable, unless they carry an imputation of a criminal breach of duty. I will not give this my sanction, because I think for imputation of ignorance to one in a profession or office of profit, an action will certainly lie."

After it had once been established that a magistrate might recover a pecuniary compensation for words which rendered his tenure precarious, the action in reason and principle extended itself to all imputations which could affect that tenure, and as gross ignorance is, as well as corruption, a *sufficient cause of [*121] deprivation, it is difficult to say why an imputation of the former kind should not be actionable as well as one of the latter; the malice of the author, the falsity of the charge, and its probable consequences, being in the two cases precisely similar. It may be added, that the distinction is inconsistent with the class of cases in which barristers and physicians (whose situations are in law considered as merely honorary) have been allowed to recover for words imputing want of ability, as well as for those which charged them with want of integrity.

The case of *Bill (d) v. Neal* was a precedent for the opinion of C. J. Holt, in the case of *Howe v. Prinn (e)*. There Foster, C. J. and Wyndham and Twysden, Js. decided against the opinion of Mallet, J. that the words, "He is a fool or ass, a beetle-headed justice," were not actionable. But the three justices founded their opinion upon the cases of *Sir John Hollis v. Briscow (f)*, and of *Hammond (g) v. Kingsmill*.

In the former case, the plaintiff was a justice of the peace and deputy-lieutenant of a county, and the defendant said to his servant, "Your master is a base rascally villain, and is
[*122] neither nobleman, knight, or gentleman, but a most villainous rascal, and by unjust means doth most villanously take other men's rights from them, and keepeth a company of thieves and traitors to do mischief, and giveth them nothing for their labors but base blue liveries, and this all the country reports, and other good he doeth not any." And the defendant had judgment, chiefly on the ground, that the words were to be construed according to the now exploded doctrine of the *mitior sensus*, for which reason the case can scarcely be considered as an authority. In the latter case, the words were, "He *was* a debauched man, and not fit to be a justice." But it appears (*h*) that the judgment in that case was given for the defendant, because the words were spoken of a time past; and Twysden, J. said, that it would have been otherwise if the words had been, "he is a *debauched man*." The two cases, therefore, upon which reliance was placed, in the case of *Bill v. Neale*, seem to be no sufficient authorities for that decision.

Where words relate to a man's official character, the danger of exclusion from office gives rise to the action. It was held, indeed, that an action was maintainable for the words, "When (*i*) thou wert a justice thou wert a bribing justice." And it was said, that though they refer to a thing past, yet they defame him
[*123] for ever in other people's *opinions, and make him accounted unworthy to bear office afterwards. The au-

(*d*) 1 Lev. 52. (*e*) Holt, 652.

(*f*) Cro. J. 58.

(*g*) 7 J. 1.

(*h*) 1 Vent. 50. *Sir J. Herle v. Osgood*.

(*i*) Yel. 153

thority, however of this decision appears to be very suspicious, and the reason given would apply to every case where general want of integrity is imputed to a private individual, for it may by possibility have the effect of preventing him from being put into the commission.

C. J. De Grey (*k*), in giving judgment in *Onslow v. Horne*, said, "I know of no case, wherever an action for words was grounded upon eventual damages, which may possibly happen to a man in a future situation, notwithstanding what the chief justice throws out in 2 Vent. 366., where he is made to say, 'That where a man had been in an office of trust, to say he behaved himself corruptly in it, as it imported great scandal, so it might prevent his coming into that or the like office again,' I think the chief justice went too far" [1].

And where an action is brought for words spoken of a barrister or physician, it must appear that he practiced (*l*) as such at the time the words were spoken; for otherwise the words could not have affected him professionally. A doubt has been raised, whether damages are properly recoverable by barristers and physicians for words relating to their professions, since [*124] their fees are merely honorary, and not demandable in a court of law (*m*) [2]; the actual decisions, however, upon the subject, leave no doubt as to their right to recover for such words; and if their situations be considered as merely confidential, their

(*k*) 3 Wils. 188. (*l*) 6 Bac. Ab. 215. Ib. 216. Sty. 231. Poph. 207.

(*m*) 6 Bac. Ab. 210.

[1] In *Forward v. Adams*, 7 Wendell 204, it was held that an action did not lie for defamatory words spoken in reference to the official conduct of the plaintiff whilst he held a place of public trust and confidence, where the words were spoken *after* the expiration of the term for which the office was held; but in *Cramer v. Riggs*, 17 Wendell 209, an action for a *libel* imputing corrupt conduct to the plaintiff whilst holding a public station, was sustained, although the libel was published after the expiration of the term of service of the plaintiff. The difference in the decisions rests upon the distinction that an action for a *libel* is sustained on the ground that it exposes the party to public odium and disgrace, whereas for words not actionable in themselves, an action does not lie unless *special damage* be alleged and proved.

[2] See note [1] page 119, *ante*.

right to recover rests upon the same foundation with that of magistrates and others, whose offices are of a similar description.

AS TO THE EXTENT OF THE ACTION.

The action appears to extend to all offices of trust or profit, without limitation, provided they be of a temporal nature. Thus it has been held, that an action is maintainable for words spoken of a churchwarden (*n*).

It has been said, that to call (*o*) an escheator, coroner, a sheriff, attorney, or such as are officers of record, "extortioner," an action lies; but that for calling a bailiff or steward of a base court, who are not officers of record, "extortioner," no action lies; because extortion cannot be but in such as are officers of record.

[*125] There seems, however, to be little force in this distinction, for any man is punishable for extortion (*p*).

It was held, that for saying of the deputy of Clarencieux, king of arms, that he was (*q*) a "scrivener, and no herald," an action was maintainable. So for words of the master of the mint (*r*); of a clerk to a public company (*s*); of a town clerk (*t*) of a steward (*u*) of a court.

But where the defendant (*x*) said of a member of parliament, "As to instructing our members to obtain redress, I am totally against that plan; for as to instructing Mr. Onslow (the plaintiff), we might as well instruct the winds, and should he (the plaintiff) even promise his assistance, I should not expect him to give it us;" after verdict for the plaintiff, judgment was arrested, and it was observed by C. J. De Grey, on that occasion, that the words did not charge the plaintiff with any breach of his duty, his oath, or any

(*n*) Sty. 338. 1 Vin. Ab. 463. Cro. J. 339. 2 Buls. 218. Cro. E. 358.

(*o*) Dal. 45. pl. 35. 1 Vin. Ab. 463. (*p*) Dal. 43. 1 Vin. Ab. 463.

(*q*) Cro. El. 328.

(*r*) Leo. 88.

(*s*) Cro. El. 358.

(*t*) Hutt, 23.

(*u*) 1 Roll. Ab. 56.

(*x*) Onslow v. Horne, 3 Wils. 177. Words which are in themselves actionable, are not the less so from having been applied to a candidate to serve in parliament. Harwood v. Sir J. Astley. 4 Bos. & Pul. 47. But see note [1], page 194 infra.

crime or misdemeanor, whereby he had suffered any temporal loss in fortune, office, or in any way whatever.

*The action extends to words spoken of men in their [*126] profession, as barristers(*y*), attorneys(*z*) physicians, (*a*) and clergymen (*b*). But it may be doubted whether words spoken of a clergyman would be actionable, unless he held some benefice or preferment, of which he might be deprived if the words were true. The reason usually given for supporting the action in such a case, is that the imputation would be a cause of deprivation (*c*). But if he be in actual receipt of any professional temporal emolument, as preacher, under lecturer, or even an occasional reader, and the charge, if true, would be ground of degradation from holy orders, the imputation would, it seems, in principle, be actionable.

An action extends to words affecting a person in the particular art by which he gains his livelihood, as of a schoolmaster (*d*). It has been held, indeed, that to slander a schoolmistress, who taught children to read and write, in her vocation, was not actionable. The authority of the *dictum, however, ap- [*127] pears to be questionable. It was decided, in the case in which it was reported to have been delivered, that to accuse a midwife (*e*) of ignorance in her profession was actionable; and it is difficult to say upon what principle a schoolmistress is not as much entitled to the protection of the law against malicious attacks, by which her means of living are likely to be impaired, as a midwife.

So any words tending to injure a merchant or tradesman are actionable; whether they reflect upon the honesty of his dealings, his credit, or the excellence of the subject matter in which he deals.

To say of a cornfactor, "You are a rogue and a swindling rascal,

(*y*) 2 Vent. 28.

(*z*) 1 Lev. 297.

(*a*) 1 Roll. Ab. 54. per Twisden, 1 Ven. 21. Cro. Car. 270.

(*b*) Al. 63. 3 Lev. 17. 1 Roll. Ab. 58. Str. 649. As to say of a clergyman he speaketh lies in the pulpit, for it is a cause of *deprivation*. 1 Holt. 58. 1. 30. But to say of a clergyman, you are an old rogue, rascal, and contemptible fellow it seems is not actionable. *Musgrove v. Bovey*, Str. 946.

(*c*) 1 Roll. 58. 1. 30.

(*d*) 2 Roll. R. 72. Het. 71.

(*e*) 1 Vent. 21.

you delivered me 100 bushels of oats, worse by 6s. a bushel than I bargained for," are actionable without proof of special damage (*f*).

And the action seems to extend to words spoken of a person in *any lawful employment*, by which he may gain his livelihood.

The defendant said (*g*), "Thou has received money of the king to buy new saddles, and hast cozened the king, and [*128] bought old saddles for the "troopers." And the words were held to be actionable; for it was said, it was not material what employment the plaintiff held under the king, if he might loose his employment and trust thereby, and that it was immaterial whether the employment was for life or for years.

The defendant (*h*) said of a person employed by the under-post-master to carry about post letters, on which he had a profit, "He has broken up letters, and taken out bills of exchange." After verdict and judgment for the plaintiff, one cause of error assigned was, that no action would lie for scandalizing such an employment; and Hale was of opinion, chiefly from the quality of the employment, that the judgment ought to be reversed; for he said that a man should not speak disparagingly of his cook or groom, but an action would be brought, if such action could be maintained.

The humility of the employment or occupation seems, however, to be no objection to the action either in law or reason; and it has long been clearly established, that an action is maintainable for malicious misrepresentations of the characters of menial servants,—a subject which will afterwards be more fully considered.

[*129] In the case of *Seaman v. Bigg* (*i*), in the reign of Cha. I., it was held, that the words, "Thou art a cozening knave, and hast cozened thy master of a bushel of Barley, "spoken of a servant in husbandry, were actionable; and the court said, that though true it is, generally, an action will not lie for calling one cozening knave, yet where they be spoken of one who is a servant, and accomptant, and whose credit and maintenance depends upon his faithful dealing, and he by such disgraceful words is de-

(*f*) *Thomas v. Jackson*, 3 Bingham, 104.

(*g*) Mar. 82. 1 Vin. Ab. 465. pl. 19. *Sir. R. Greenfield's case*.

(*h*) 1 Vent. 275.

(*i*) *Cro. Car.* 480.

prived of his livelihood and maintenance, there is good reason it should leave an action for loss of his credit and means. So the words, "He (*k*) is a cheating knave," applied to a lime-burner in his employment, have been deemed to be actionable.

But a jobber (*l*) or dealer in the public funds, is not considered as a known trader, and possessing a character as such.

It does not appear to be necessary, that the party should gain his living in the character to which the slander is applied but it is sufficient if he habitually act in that character, and derive emolument from it.

The rule, however, does not seem to extend to representations, which affect nothing more than casual instances, in which the plaintiff has assumed *such a character. So that [*120] words misrepresenting the value of a horse, or particular piece of furniture, which the proprietor wishes to dispose of, would not be actionable, unless some special damage resulted from them.

Next as to the degree of *certainty and precision* requisite to make the words actionable.

The only question arising upon this point seems to be this, Do the words in any degree prejudice the plaintiff in his office, profession, or employment? If they do, they are actionable; the quantum of damage being a mere question of fact for the consideration of the jury. Words in general belonging to this class relate either to the plaintiff's *integrity*, his *knowledge*, *skill*, or *diligence*, his *credit*, or to the *subject matter in which he deals*.

The effect of such imputations will be separately considered.

To impute want of integrity to any person who holds an office of trust or of profit is actionable: as to say of a judge (*m*), that "His sentence was corruptly given" [1].

Or of a justice of the peace (*n*), "I have often been with him for justice, but could never get anything at his hands but injustice" [2].

(*k*) 1 Lev. 115. Terry v. Hooper.

(*l*) 2 Bos. & Pul. 281.

(*m*) Cro. Eliz. 305.

(*n*) Cro : Car 14.

[1] See Chaddock v. Briggs, 13 Mass. R. 253, per Parker, C. J. ; and Chipman v. Cook, 2 Tyler 456.

[2] In Lindsey v Smith, 7 Johns. R. 360, an action was sustained for the

*Or, "He covereth and hideth felonies (*o*), and is not worthy to be a justice of the peace." [*a a*]

[*131] Where a person holds an office or situation, in which great trust and confidence must be reposed in him, words which impeach his integrity generally, though they contain no express reference to his office, are actionable; since they must necessarily attach to him in his particular character, and virtually represent him as unfit to hold that office or situation.

Thus it has been held, that to say of a bishop, "He is a wicked man (*p*)," is actionable.

The defendant said of a justice of the peace and deputy lieutenant (*q*), "He is a Jacobite, and for bringing in the Prince of Wales and popery." And the words were held to be actionable, though it did not appear that the speaker applied the words to his offices, because without any such application, they imputed such religious opinions and political principles, as rendered him in law unfit for those situations.

So where the defendant said of the plaintiff, who was a justice of the peace (*r*), "I am in danger of my life, my blood is sought, and I was like to have been murdered; I was at Sir J. [*132] Harper's (the plaintiff's) house, and John Harper *drew me forth to see a gelding in the stable, and then Thomas Beaumont, Sir H. Beaumont's son, did throw his dagger at me twice, and thrust me through the breeches twice with his rapier to have killed me, all this was done by the instigation of Sir J. Harper, and I can prove it."

words "Lindsey had been feed by Abner Wood, and I could do nothing when the magistrate was in that way against me." To render the words actionable, however, they must be spoken of the plaintiff in his official character or conduct *Oakley v. Farrington*, 1 Johns. Cas. 129.

(*o*) 4 Rep. 16.

[*a a*] The words, "you are a rascal, a villain, and a liar," spoken of a justice in the execution of his office, are actionable, for they import a charge of acting corruptly and partially. *Aston v. Blagrove*, Str. 617.

(*p*) 2 Mod. 159.

(*q*) *How v. Prinn*, Holt, 652.

(*r*) *Sir J. Harper v. Francis Beaumont*, Cr. J. 56.

In this case, although no misconduct in office was particularly pointed out, it was held that the action well lay; the instigation to do such an outrageous act being against the plaintiff's oath, and a great misdemeanor, for which he was liable to fine and to be put out of the commission.

The defendant said to the plaintiff, who was one of the attorneys or clerks of the King's Bench, and sworn to deal without corruption in his office, "You are well known to be a corrupt man, and to deal corruptly." And upon giving judgment for the plaintiff, it was said, *quod sermo relatus ad personam, intelligi debet de conditione personæ (s)*.

The defendant said of the plaintiff, who was an attorney, generally (*t*), "He is a common barretor." After verdict, though it was objected, that the words were not actionable, having been spoken of the plaintiff as a common person, and not in relation to his office, yet the court held *that the action was main- [*133] tainable; for it is a great slander to an attorney to be called and accounted a common barretor, who is a maintainer of brabbles and quarrels, and said that words are to be construed *secundum conditionem personarum* of whom they are spoken.

The defendant said of an attorney (*u*), "Though art a false knave, a cozening knave, and hast gotten all that thou hast by cozenage, and thou hast cozened all that have dealt with thee." And the court held that the words were actionable, as touching the plaintiff in his profession.

An attorney brought an action for the words (*x*), "I have taken out a judge's warrant to tax Phillip's (the plaintiff's) bill, I'll bring him to book, and shall have him struck off the roll." Lord Kenyon, C. J. ruled, at nisi prius, that the words were not actionable; and added, had the words been, "He deserves to have been struck off the roll," they would have been actionable. With respect to this distinction, it may be proper to suggest a doubt, whether the words in the principal case cited would not in common acceptation convey to the hearer the same meaning with

(s) 4 Rep. 16.

(u) Cro. Jac. 586.

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(t) Cro. Car. 192.

(x) Phillips v. Jansen, 2 Esp. 624.

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[*134] the words which the learned judge *is reported to have deemed to be actionable, since they seem as clearly to evince the opinion of the speaker, that the plaintiff deserved to be struck off the roll, and no one would choose to employ an attorney who made exorbitant charges.

Words imputing dishonesty to a tradesman, it seems, are not actionable, unless they be spoken with reference to trade. So that to call (*y*) a tradesman a cheat, generally, has been held not to be actionable. But otherwise to say, "He (*z*) keeps false books;" for the words evidently relate to his course of trading [1]. So to call a tradesman a rogue (*a*) or a cheat, with reference to his trade, is actionable. But to say generally of such a person, "Thou (*b*) hast no more than what thou hast got by cozening and cheating," has been (*c*) held not to be actionable.

It may, however, be doubted, whether there is any solid distinction between these cases, since every tradesman's livelihood depends in some measure upon his general character for honesty and integrity; and it is difficult to suppose, that a general imputation of dishonesty, if believed, would not operate to his pre-
[*135] judice. *It seems that some degree of trust and confidence must be reposed in the plaintiff, in order to render words reflecting upon his character for integrity actionable. Thus the words of a carpenter (*d*), "He has charged Mr. Andrews for forty days' work, and received the money for the work, that might have been done in ten days, and he is a great rogue for his pains," were, after verdict, held not to be actionable.

The distinction seems to be this: Where great confidence must necessarily be reposed, as in an attorney or superintendent, words

(*y*) 3 Salk. 326.

(*z*) Holt, R. 39.

(*a*) Burr. 1688.

(*b*) 12 Mod. 307.

(*c*) 12 Mod. 307.

(*d*) Lancaster v. French, Str. 797.

[1]. Words charging the *keeping false books* are actionable when spoken of a *merchant*, Backus v. Richardson, 5 Johns. R. 476; or of a *blacksmith*, Burtch v. Nickerson 17 Id. 217; but not when spoken of a *sawyer*, Rathbun v. Emigh, 6 Wendell 407. The latter case however, manifestly proceeded on the ground that the business of a sawyer did not require the giving of credit and keeping of books, for it was admitted that in such cases the words would be actionable.

generally reflecting upon his character are actionable ; but where mere ordinary confidence is reposed, in the common courts of honest dealing, as that a tradesman shall charge a fair price for his goods, or an artificer, surveyor, or mechanic for his labour, the law holds that the words are not so injurious as to bear an action unless they are applied to the plaintiff's trade or business with certainty and precision.

So where the office, profession, or employment of the plaintiff, requires great talent and high mental attainments, general words, imputing want of ability, are actionable without express reference to his particular character, for they necessarily include an ability to discharge the duties of such a situation ; but where the employment *is of a mere mechanical nature, the words [*136] to be actionable must be applied to it clearly and unequivocally.

Thus, to say of a barrister, (*e*), generally, that he is a "dunce," is actionable, the word dunce being commonly taken to mean a person of dull capacity who is not fit to be a lawyer [1].

So, to say of a physician (*f*), that he is "no scholar," is actionable, a learned education being considered to be an essential qualification in the medical profession.

To say of a servant, that he is a "lazy, idle, and impertinent fellow," is actionable ; for these words, though spoken without express reference to his service, cannot but affect his character as a servant, as no one would be willing to employ a person of idle and impertinent habits.

In general, however, the words must be spoken with reference to the particular situation of the plaintiff in which case they are actionable if they impute any want of knowledge, skill, or diligence, in the exercise of his office or avocation : as to say of an apothecary (*g*) "It is a world of blood he has to answer for in this town : through

(*e*) *Peard v. Johnes*, Cro. Car. 382.

(*f*) 6 Bac. Ab. 215. 1 Roll. Ab. 54. Cro. Car. 270.

(*g*) *Tutty v. Alewin*, 11 Mod. 221.

[1] But when the words only impute ignorance or want of skill in a *particular suit*, they are not *per se* actionable, *Foot v. Brown*, 8 Johns. R. 64.

his ignorance he did kill a woman and two children at
 [*137] Southampton ; he did kill J. P. *at Petersfield ; he was
 the death of J. P. ; he has killed his patient with phys-
 sic.”

So (*h*) where the defendant said of a midwife, “ Many have per-
 ished for her want of skill.”

The words spoken of a watchmaker were, “ He (*i*) is a bungler,
 and knows not how to make a good piece of work.” After verdict
 for the plaintiff, the words, on motion in arrest of judgment, were
 held by the court not to be actionable, not having been laid to be of
 the plaintiff’s trade, but it was said that had the words been, “ he
 knows not how to make a good watch,” they would have been action-
 able. It may, however, be doubted whether this case would not now
 meet with a different decision ; the point upon which the court gave
 judgment, was in a great measure technical ; and indeed the averment
 that the words were spoken in derogation of the plaintiff’s workman-
 ship, seems scarcely to be necessary, for if it were believed that the
 plaintiff was a bungler, and could not make any piece of work well,
 how could it be supposed that he could make a good watch, a piece
 of work requiring very considerable skill and dexterity [1].

The law has shown great tenderness in protecting mer-
 [*138] chants *and traders against imputations upon their credit,
 which if believed must necessarily operate to their seri-
 ous prejudice. Formerly (*k*), indeed, it was held that the words,
 to support an action, must import bankruptcy : this doctrine has,
 however, long been abandoned (*l*), and it seems that such words

(*h*) Flower’s case, Cro. Car. 211.

(*i*) Redman v. Pyne, 1 Mod. 19.

(*k*) Holt. 39.

(*l*) See Reed v. Hudson, 1 Ld. Ray. 610. Southam v. Allen, Sir T. Ray. 231.
 Whittington v. Gladwin, 5 B. and C. 160.

[1] In Tobias v. Harland, 4 Wendell 537, the plaintiff being a dealer in patent
 lever watches, made at a particular manufactory, the defendant, a dealer in the
 same article made at another factory, speaking of the watches in which the
 plaintiff dealt, said they were *bad*, and *inferior to the watches in which he dealt*.
 Held on demurrer that the action did not lie ; that to render words depreciating
 an article in which another deals actionable *per se*, they must import *deceit* or
mal-practice in the making or vending.

spoken of a person in any business are now considered actionable. And it is not essential to the action, that the words should impute want of credit at the time of speaking them. The defendant said, "He (*m*) came a broken merchant from Hamburgh;" and the words were held to be actionable, since the plaintiff was charged with having been once broken *et qui semel est malus semper presumitur esse malus in eodem genere*, and that they were a cause of discrediting the plaintiff in his trade, and of injuring him in his credit, which was a great means of gain. And it is not necessary that the words should be spoken with express reference to the plaintiff's trade, since a general charge of want of credit necessarily includes the particular one, and is equally pernicious with a more precise *allegation, thus to say generally [*139] of a merchant, that he is "*broken*," is actionable, these being common and vulgar words of one who fails in his credit and becomes a bankrupt. Words of this class are actionable when applied to a person carrying on a business purely mechanical, so that to call a dyer (*n*) bankrupt knave, is actionable [1].

And any words which in common acceptation imply want of credit are sufficient, as to say of a tailor (*o*) "I heard you were run away." Formerly, indeed, it was held that to call a trader "bankruptly knave (*p*)" was not objectionable; but the distinction between words adjectively spoken, and those containing an express and direct allegation, have, as has already been observed, been long deservedly disregarded.

So, to say of a stock-broker (*q*), that he is "a lame duck," is actionable.

So of a trader, "You are a sorry pitiful fellow and a rogue, and compounded your debts for 5s. in the pound (*r*)."

(*m*) *Seycroft v. Dunker*, Cro. Car. 317.

(*n*) Cro. J. 585.

(*o*) *Davis v. Lewis*, 7 T. R. 17.

(*p*) Cro. J. 345.

(*q*) *Morris v. Langdale*, 2 B. & P. 84.

(*r*) *Ld. Raym.* 1480. Str. 762.

[1] The action has been held to lie for similar words spoken of a *drover*, *Lewis v. Hawley*, 2 Day 195; also of a *brewer*, *Hall v. Smith*, 1 Maule and Sel. 287.

[*140] So where the defendant said (*s*), “All is not *well with Daniel Vivian; there are many merchants who have lately failed, and I expect no otherwise of Daniel Vivian.”

So, to say of a pawnbroker (*t*), “He is a broken fellow.”

To a milliner (*u*), “You are not worth a farthing.”

So though words merely import the speaker’s opinion; as where the defendant said (*x*), “Two dyers are gone off, and for ought I know Harrison will be so too within this time twelvemonth.”

So where defendant said to an upholsterer (*y*), “You are a soldier, I saw you in your red coat doing duty; your word is not to be taken:” the words were held to be actionable, it being a common practice, at the time they were spoken, for traders to protect themselves against their creditors by a counterfeit enlisting, a soldier having by act of parliament the privilege of freedom from arrest.

So where the words spoken of a carpenter (*z*); “He is broken and run away, and will never return again;” after verdict for the plaintiff, *it was urged in arrest of judgment, that the words were not actionable, for though broken, the plaintiff was as good a carpenter as ever; but it was answered by the court, that the credit which a man has in the world may be the means to support his skill, for he may not have an opportunity to show his workmanship without those materials wherewith he is entrusted.

And where the defendant said of a husbandman (*a*), “He owes more than he is worth; he is run away:” the words were held to be actionable, though it was objected that it should not only appear that the plaintiff had a trade, but that he got his living by it.

And next; the words are actionable when they throw discredit upon the particular commodity in which the party deals.

Thus, to say of a trader (*b*), “He hath nothing but rotten goods

(*s*) 3 Salk. 326.

(*t*) Holt. R. 652.

(*u*) Cro. Car. 265.

(*x*) 10 Mod. 196, *Harrison v. Thornborough*.

(*y*) *Arne v. Johnson*, 10 Mod. 111.

(*z*) *Chapman v. Lamphire*, 3 Mod. 155.

(*a*) *Dobson v. Thorstone*, 3 Mod. 112.

(*b*) *Cor. Car.* 570.

in his shop," is actionable ; though it was said in the case referred to, that had the words been " he hath rotten goods in his shop," they would not have supported the action, and that the slander consisted in saying that he had *nothing* but rotten goods in his shop.

So, to tax a bookseller falsely (*c*) with having *pub- [*142] lished an absurd poem, is actionable ; the evident tendency of the imputation being to injure him in his business.

So where the defendant said of the plaintiff, who was an innkeeper (*d*), " Deal not with Southam, for he is broken, and there is neither entertainment for man nor horse."

And words imputing insolvency to an innkeeper are actionable, though at the time the words were spoken he was not subject to the bankrupt laws (*e*).

So a *false and malicious* account (*f*) of the performance at a place of public amusement will support an action.

So where the defendant, who was printer of a newspaper, called the Oracle, published the following paragraph concerning the True Briton newspaper, of which the plaintiff was proprietor :

" *Times v. True Briton (g).*

" In a morning paper of yesterday was given the following character of the True Briton :—that ' It was the most vulgar, ignorant, and scurrilous journal ever published in Great Britain.' To the above assertion we assent, and to this account we add, that the first proprietors abandoned it, and *that it is the [*143] lowest now in circulation, and we submit the fact to the consideration of advertisers."

It was held by Lord Kenyon at *Nisi Prius*, that the latter words of the paragraph, as affecting the sale of the paper and the profits made by advertising, were actionable.

Where the plaintiff was a butcher (*h*), and brought his action for

(*c*) *Tabart v. Tipper*, 1 Camp. N. P. 350.

(*d*) 3 Salk. 326.

(*e*) *Whittington v. Gladwin*, 5 B. & C. 150.

(*f*) *Dibdin v. Swan and Bostock*, 1 Esp. 27.

(*g*) *Heriot v. Stewart*. 1 Esp. 437.

(*h*) *Tassan v. Rogers*, 2 Salk. 693.

words taxing him with having exposed to sale the flesh of a cow which died in calving, it was held after verdict, that the words were not actionable, even though special damage was laid and proved. This case seems, however, to be very loosely reported, and is not supported by either analogy or principle.

Unless words affecting the plaintiff's means of livelihood fall within one of the foregoing descriptions, it may be concluded that they are not actionable.

The defendant said of the plaintiff, who taught girls to dance, "that she was an hermaphrodite (*i*)," and it was held that the words were not actionable, and that it was no scandal to her profession to say that she was an hermaphrodite, because men usually teach young women to dance.

(*i*) 3 Salk. 397.

CHAPTER IV.

WHERE THE WORDS TEND TO THE PARTY'S DISINHERISON OR AFFECT HIS TITLE TO LAND.

WORDS falling within this division either affect the probability of the plaintiff's succeeding to an estate in [*142] future, or impeach a title which has already accrued.

Instances of the former class, where damages have been allowed to be recovered on account of the manifest tendency of the imputation to defeat the plaintiff's expectations, are exceedingly rare, and seem to have been confined to words impeaching the legitimacy of the birth of an heir apparent.

The defendant (*a*) said to the plaintiff, who was heir apparent to his father and uncle, "Thou art a bastard." After verdict for the plaintiff, the court, on motion in arrest of judgment, held that the action was maintainable, since by reason of the words the plaintiff might be in disgrace with *his father and [*143] his uncle, and they conceiving a jealousy of him touching the same, might possibly disinherit him, and that though they eventually should not, yet that the action well lay for the damage which might come; and the cases of *Vaughan v. Leigh*, and of *Banister v. Banister* (*b*), were cited by Jones, J. as in point.

In the first of these cases (*c*) the plaintiff showed that land had

(*a*) *Humphreys v. Stanfield*, Cro. Car. 469. Jo. 388. Godb. 451.

(*b*) 4 Cro. 17. (*c*) Cro. J. 215. by the name of *Vaughan v. Ellis*.

been given in tail to his grandfather, and that his father had divers sons, whereof he was the youngest, and his eldest brothers living. That a certain person offered to buy the land, and was willing to give him such a sum of money for his title, and by reason of the words refused to give him any thing. After judgment for the plaintiff in the Exchequer, it was assigned for error, that it appeared by the plaintiff's own showing that he had not any present title, and therefore no cause of action. But the two chief justices conceived that although he had not any present title, it appeared that he had a possibility of inheriting the lands, and that being offered a sum of money to join in the assurance, although he had not any present title, yet by reason of the words he had a present damage, and in future might receive prejudice *thereby in case he were to claim the lands by descent.

This case, though cited as an authority for the former decision, does not warrant it to the full extent, for in the latter a loss had actually accrued to the plaintiff in consequence of the words; in the former the supposed prejudice consisted in the probability that the expectation of the heir apparent would be defeated.

In the case of *Turner v. Sterling* (*d*), it was said by the court, "The law gives an action for but a possibility of damage, as an action lies for calling an heir apparent bastard."

In an earlier case (*e*) the court observed, "The word bastard is determinable by the Spiritual Court, but if the plaintiff add further words to entitle himself as heir, or show some *possibility* of being heir, this shall make the same words calling him bastard to be actionable.

The decisions upon this point do not, however, appear to have been uniform; in the case of *Turner v. Sterling* (*f*), above cited, Vaughan, J. said, "I take it not to be actionable to call a man a bastard whilst his father is alive, the books are cross in [*145] it; nay, if lands had *descended, I doubt whether it would be actionable any more than to say one has no title to land."

(*d*) 2 Vent. 26. Vaughan, J. dissent.

(*e*) 2 Buls. 90.

(*f*) 2 Vent. 26. See also 1 Roll. Abr. 37. pl. 18.

The last express decision upon the point appears to be that of *Humphreys v. Stanfield* (*g*), already referred to, where it was decided that words which alleged that an heir apparent was a bastard, were actionable.

Words impeaching the plaintiff's *present title* to lands, have in many of the older cases been deemed to be actionable without proof of special damage.

Thus, where a remainder-man (*h*) brought an action against the defendant for saying that the tenant in tail had issue one D. who was then alive, it was held that the action was maintainable.

It appears, however (*i*), from a copious class of decisions, that no action can be supported for words affecting the present title of a plaintiff to an estate, without showing that some special damage and inconvenience has resulted from them, as that he was prevented from selling or making some advantageous disposition of it: the particular *nature* of such specific prejudice [*146] will be hereafter considered (*k*).

Although the numerous decisions upon the subject seem to leave no doubt that words reflecting upon a party's present title must, to give a right of action, be attended with special damage, it does not follow as an immediate and necessary consequence of this doctrine, that imputations immediately tending to defeat the prospects of an heir apparent, are not in themselves actionable, though it appears at first sight somewhat strange to say that it can be considered more prejudicial to impeach a title resting merely in expectancy, than to derogate from one already existing. There is, however, a plain line of distinction between the two cases. Where lands have already descended to the heir, to call him bastard, can work little prejudice; the false imputation cannot divest the estate, though it may involve the owner in litigation, for which special damage he is entitled to his remedy; but reflections of this nature, when cast upon an heir apparent, may produce consequences infi-

(*g*) Cro. Car. 469.

(*h*) Bliss v. Stafford, Ow. 27. Mo. 188. Jenk. 247.

(*i*) Cro. Eliz. 196. 3 Keb. 153. 1 Vin. Ab. 553. Sty. 169. 176. Palm. 529. Snede v. Badley, 3 Buls. 74.

(*k*) See title Special Damage

nitely more serious, for they may induce the ancestor to disinherit the progeny which he conceives to be spurious.

[*147] In the former case the evil resulting from the "slander can be but slight and temporary; in the latter it may prove utterly irremediable. The cases relating to words of the latter description are of considerable antiquity and of rare occurrence, and though they certainly carry the doctrine of presumptive and anticipative loss to a great extent, yet they seem to be supported and warranted by the application of sound and general principles to the peculiar exigency of the case.

CHAPTER V.

WHERE THE SLANDER IS PROPAGATED BY PRINTING, WRITING, OR SIGNS.

BESIDES the communications which have been enumerated under the preceding divisions, many have been deemed to be intrinsically actionable, although unattended with special [*148] damage, on account of the *mode* in which they have been effected.

Observations upon this class of cases, relate, either to the *reasons* and *authorities* for this distinction, or to the *extent* to which it has been carried.

First, as to the *reasons* and *authorities* upon which the distinction is founded.

It has been said (a) that “slander in writing has at all times, and with good reason, been punished in a more exemplary manner than slanderous words, for as it has a greater tendency to provoke men to breaches of the peace, quarrels, and murders, it is of much more dangerous consequence to society. Words, which are frequently the effect of a sudden gust of passion, may *soon be buried in oblivion; but slander which is com- [*149] mitted to writing, besides that the author is actuated by more deliberate malice, is for the most part so lasting as to be scarcely ever forgiven.”

(a) 6 Bac. Ab. 202, tit. Slander.

And, that “(b) written slander hereby receives an aggravation, in that it is presumed to have been entered upon with coolness and deliberation, and to continue longer and propagate wider and farther than any other scandal.”

These reasons embrace three distinct points :

1. The greater degree of danger to the public peace.
2. The greater degree of malice in the author of the scandal.
3. The increased detriment to the object of the slander from its more extended circulation and duration.

In the first place, although the apprehension of danger to the public peace may furnish a sufficient ground for subjecting the publisher of a libel to penal visitation, that is a consideration which cannot at all affect the right to a civil remedy by action.

In the next place, it is clear that written slander may evince a higher degree of deliberation, and therefore of malice, than that which is merely oral ; it may, however, be doubted [*150] whether that *superior degree of malice constitutes a sound and well principled distinction between oral and written slander.

As far as regards the intention of the publisher, it seems to be certain, that malice, in law, is sufficient to support the action ; that is, a party is liable if he voluntarily publish that which is injurious to another, and occasions damage to him without legal excuse (c). Whether, then, the calumniator speak or write that which is injurious to another, malice in law equally exists, and the mere degree of malice, however it may affect the question of damages, does not, in principle, constitute a distinct limit between that which is actionable and that which is not so.

Is then the reason for making written defamation actionable without special damage, where an oral communication would not have been so, the increased detriment which may probably arise to the party, in consequence of the means of publication which have been resorted to ?

Such a consideration obviously applies rather to the quantum of

(b) 4 Bac. Ab. 449. 5 Co. 125. Ld. Ray. 416. 12 Mod. 219.

(c) Vide Preliminary Discourse, *infra* tit. Intention, and *supra*, p. 9.

injury sustained than to the actual existence of damage; and if any legal damage can, in any case, be presumed to have arisen from the publication of written slander, must not a similar presumption obtain, though (it may be) to an inferior extent, when the very *same matter is published orally? How do the cases [*151] differ but in degree? The extent of mischief merely affects the quantum of damages, and not the right of action. If damage to an amount which can be estimated by a jury has been sustained, by publishing the scandal to a hundred persons, may not the damage be also estimated where the publication has been limited to ten? Whether a greater degree of damage will accrue from written than from oral slander, must be casual and uncertain; words spoken to a multitude, may be more likely to injure their object, than if they had been communicated by writing to one or a few individuals.

It is, however, to be recollected, that the very presumption itself, the limitation of which gives rise to this difficulty and apparent inconsistency, is purely artificial and arbitrary, and consequently its limits are naturally of the same description.

From the exigency of the case, damage is presumed without proof, that is, the communication is deemed to be a substantive ground of action not in all cases, for so wide a presumption would too much encourage a spirit of vexatious litigation, but in cases where the necessity for making such presumption is urgent and apparent.

The principle, then, being once admitted, that damage may, in cases of exigency, be presumed, and an opposite principle of public policy requiring *that such a presumption [*152] ought not to obtain generally, but should be limited and restrained, it is evidently a mixed question of expediency, arising from the particular nature of any class of cases on the one hand, and of public policy on the other, what limitation shall be applied to them. And consequently, although if the question had depended wholly upon intrinsic reasons, such a distinction between oral and written slander might have been deemed incongruous; it cannot be so regarded, when it is considered that it depends partly on considerations of extrinsic policy, and it may obviously consist well with

sound legal policy, to extend the remedy where the defamation is in writing, and therefore capable of an extensive, permanent, and mischievous diffusion, beyond those limits which are assigned in case of mere oral communications.

Whether such a distinction can be supported on any just grounds of reason or convenience has been the subject of much controversy ; in the last case in which the subject was judicially considered, the court intimated that they supported the rule on the ground of precedent only (s).

The number of actual decisions founded upon the difference between oral and written slander is exceedingly small ; but [*153] the distinction itself has *been very frequently collaterally countenanced and recognized by most able and accomplished judges, and is now fully established.

It appears to have been held in early times, that a libel (c) on the character of a private individual was punishable by way of indictment.

Sir Edward Coke, in his third Institute (d), cites a record of the conviction of Adam de Ravensworth, who was indicted in the King's Bench, in the reign of Edward III. for the making of a libel in the French tongue against Richard of Snowshall, calling him therein Roy de Raveners, &c. and adds, "so a libeller, or publisher of libel, committeth a public offence, and may be indicted thereof at Common Law."

This, indeed, was a criminal proceeding, and no instance of a civil action in case of libel appears till long after ; it seems, however, to have been frequently held (e), that where a party is indictable for any written defamation, an action is also maintainable at the suit of the party injured.

(s) *Thorley v. Lord Kerry*, 4 Taunt. 355, *infra*, 162.

(c) It is to be recollected that the term LIBEL, in the following pages, is used to signify any writings, pictures, or other signs, tending to injure the character of an individual, or to produce public disorder.

(d) 74.

(e) *Skin.* 123. 2 *Wils.* 204. 4 *Com. Dig.* tit. Libel. C. 3. 6 *Bac. Ab.* tit. Slander, 202. 3 *Bl. Comm.* 125. 2 *Camp. C.* 511. It has, however, been said, that in some instances a libel may be indictable, although it be not actionable. 3 *Mod.* 139. *Com. Dig.* Libel, A. 2.

*In the case of *Dr. Edwards v. Dr. Wooton* (f) [*154] in the Star Chamber, it appeared that Dr. Wooton had written to Dr. Edwards a letter, containing scandalous matter, to which he had subscribed his name, and that he had likewise published and dispersed a number of copies of the same letter. And it was resolved, by the Lord Chancellor Egerton, the two Chief Justices, and the whole court, that this was a subtle and dangerous kind of libel, inasmuch as the writing a private letter, to another, *without other publication*, would not support an *action on the case*, but that when published to others, to the *scandal of the plaintiff*, as it had oftentimes been adjudged, *an action lieth*. And it was said, that although the defendant had subscribed his name to the letter, yet since it contained scandalous matter, it was to be considered in law as amounting to a libel. From this case, though the contents of the letter in question do not appear, the opinion of the Lord Chancellor and the two Chief Justices may be collected, that generally, scandalous matter published in writing was a ground of action.

Peacock (g) exhibited his bill against Sir George Raynal in the Star-Chamber, for a bill written under these circumstances :

The plaintiff was heir general to Richard Peacock, who was of the age of 86 years, and had lands of inheritance to *the value of £800 a year; the defendant, who had [*155] married the daughter of Sir Edward Peacock, who was a younger brother of Richard Peacock, wrote a letter to Richard Peacock, informing him that the plaintiff was not the son of a Peacock, and was a haunter of taverns, and that divers women had followed him from London to the place of his dwelling, that he had a desire to hear of the death of the said Richard, and that all the inheritance would not be sufficient to satisfy his debts, and many other matters concerning his reputation and credit. And it was agreed that this was a libel, and for that the defendant was fined to £200, and imprisonment, according to the course of the court; and the plaintiff let loose to the *Common Law* for his recompence for the damages which he had sustained.

(f) 12 Rep. 35.

(g) 2 Brownl. 151.

In the case of *King v. Sir Edward Lake*, (*h*), the libel was contained in an answer to a petition preferred by the plaintiff to the House of Commons, and consisted of many general reflections upon the conduct of the plaintiff. After verdict for the plaintiff, [*156] it was moved in arrest of judgment, that the terms of the publication were too general to support an action ; but it was said by Hale, Chief Baron, that “ Although such general words *spoken once*, without *writing* or *publishing* them, would not be actionable, yet here they being written and published, which contains more malice than if they had been once spoken, they are actionable.”

In the case of *Sir J. Austen v. Col. Culpepper* (*i*), the defendant had forged an order of the Court of Chancery, containing many defamatory reflections upon the plaintiff, and at the bottom had drawn the form of a pillory, and subscribed to it the words, “ For Sir J. Austen and his witnesses by him suborned.”

It was contended that the action was not maintainable, since no certain slander was imputed by the words, and if the words would not support the action, the representation could not, since it was not to be inferred that the parties were perjured, and that though for setting up horns, &c. for the purpose of ridicule, an indictment lay, yet that no action was maintainable ; but the court held that *an action* in such cases was maintainable, as well as an *indictment*, and referred to the case of *Col. King v. Lake* (*k*), *where [*157] the plaintiff had judgment in the Exchequer. And the court added, that to *say* of any one that he is a dishonest man, would not be actionable ; but that to *publish* it or *put it on the posts* would be actionable, and the plaintiff had judgment.

In the case of *Cropp v. Tilney* (*l*), it was said by Holt, C. J. Scandalous matter is not necessary to make a libel, it is enough if

(*h*) Hardr. 470. See also Sir Baptist Hick's case, Hob. 215. *King of Gray's Inn v. Sir E. Lake*, 2 Vent. 28. *Harman v. Delany*, Str. 888. The court, in the latter case, observed, that if bare words affecting a man in his trade were actionable, it would be much stronger in the case of a libel in a public newspaper, which is more diffusive.

(*i*) Skinner, 123. 2 Show. 314.

(*k*) Hardr. 470.

(*l*) 3 Salk. 226.

the defendant induce *an ill opinion to be had of the plaintiff, or make him contemptible and ridiculous*; as for instance, an action was brought by the husband for riding Skimmington (*m*) and adjudged that it lay, because it made him ridiculous and exposed him."

In *Bradley v. Methwyn* (*n*), which was an action on the case for a libel, Lord Hardwicke, C. J. observed, that "The present case is not for words, but for a libel, in which the rule is different, for some words may be actionable or prosecuted by way of indictment, which would not be so if spoken only, for the crime in a libel does not arise merely from the scandal, but from the tendency which it has to occasion a breach of **the peace*, by making the [*158] scandal more public and lasting and spreading it abroad, which was determined in this court in the case of *King v. Griffin*. Hil. 7. G. II."

In *Villers v. Monsley* (*o*), the libel charged the plaintiff with having the itch: upon motion in arrest of judgment, Wilmot, C. J. observed, "If any man deliberately, or maliciously, publish any thing in writing concerning another which renders him ridiculous, or *tends to hinder mankind from associating or having intercourse with him*, an action well lies against such publisher."

Bathurst, J. "I wish this matter was thoroughly gone into and more solemnly determined; however, I have no doubt at present, but that the writing or publishing any thing which renders a man ridiculous is actionable. I repeat it, I wish there were some more solemn determination that the writing and publishing any thing which tends to make a man ridiculous or infamous ought to be punished."

Gould, J. "What my brother Bathurst has said is very material; there is a distinction between libels and words: a libel is punishable both criminally and by action, when speaking the words would not be punishable either way, for speaking the words *rogue and rascal* of any one, **an action will not lie*, but if those words were written and published of any one, I doubt not an [*159]

(*m*) *Mason v. Jennings*, Sir T. Ray. 401. contra. Sed vid. 1 Show. 314.

(*n*) Selwyn's Ni. Pri. 1st Ed. 925. n. 2. B. R. M. 10 G 2. MSS.

(*o*) 2 Wils. 403.

action will lie. I think the publishing any thing of a man that renders him ridiculous, is a libel and actionable." And judgment was given for the plaintiff by the whole court, without granting any rule to show cause.

In *J'Anson v. Stuart* (*p*) the action was brought in the Common Pleas, for publishing in the Morning Post, that "The plaintiff was at the head of a gang of swindlers, a common informer, and had been guilty of deceiving and defrauding divers persons with whom he had dealings and transactions." The plaintiff demurred specially on account of the generality of the defendant's plea, and judgment having been given for the defendant below, the plaintiff carried the matter, by wit of error, into the Court of King's Bench, where the same causes were assigned for error, which before had been alleged as grounds of special demurrer.

The defendant further contended, that the declaration was insufficient, as the words "common informer" were not actionable, and the term "Swindler" was not a legal term of which the law could take notice. But Buller, J. observed, "The objection afterwards taken to the declaration *is, that the term 'swind-
[*160] ler' is too general, and cannot be legally understood, but Mr. J. Aston formerly held otherwise, for he said that the term swindling was in general use, and that the court could not say they were ignorant of it. But at all events we cannot say upon this record, that we do not understand the import of it, for it is explained to be 'defrauding divers persons.' The declaration contains as libellous a charge as can well be imagined."

This case cannot it seems be considered as decided upon the distinction in question, since it seems to have been the opinion of Mr. J. Buller, that the term "swindler," as explained by the subsequent words, was actionable without reference to the mode of publication (*q*).

Zenobio brought an action against Axtell (*r*) for publishing in the

(*p*) 1 T. R. 748.

(*q*) In *Saville v. Jardine*, 2 H. Bl. 531. it was held that the term "swindler" was not actionable.

(*r*) 6 T. R. 162.

newspaper, called the *Courier de Londres*, the following paragraph, —“The late famous Bishop of Autun, to the great satisfaction of all honest men, has just received an order to quit England: the same compliment has been paid to an adventurer, a great gambler, who calls himself the Count Zenobio.” After verdict for the plaintiff, the defendant contended, in arrest of judgment, that the publication was not libellous; *but as there was ano- [*161] ther objection, which was fatal to the declaration, the court did not give any opinion as to the actionable quality of the words.

In *Bell v. Stone* (s) the defendant wrote the following letter concerning the plaintiff, who was a land surveyor, to one N. B. to whom the plaintiff owed a large sum of money:

“After the communication I had with your son in your absence, I but little thought you would have been made the dupe of one of the most infernal villains that ever disgraced human nature; but I suppose you were deceived by those whom you thought well of, and whom he will deceive if they will give him an opportunity; I am told they are respectable, and how they can be connected with him is the most astonishing thing to me. Mr. H. writes me you called upon him, (meaning the plaintiff,) on the subject of your account, for which the villain gave you his note at five months.” Special damage was laid in the declaration, but none being proved at the trial, the learned Judge who tried the cause was of opinion that the letter, unsupported by special damage, was not actionable, and directed a verdict for the defendant. The counsel for the plaintiff, however, contending *that the letter itself was [*162] actionable, it was left to the jury to say what damages they would give, supposing the plaintiff entitled to recover, and they answered, one shilling. A rule was obtained to show cause why the verdict for the defendant should not be set aside, and a verdict entered for the plaintiff, on the count containing the letter, for one shilling, on the ground that though the words in that count might not be actionable if only spoken, yet that being committed to writing they were so.

Le Blanc, Serjt. was to have shown cause against the rule, but the court expressing themselves clearly of opinion, that *any words written and published, throwing contumely on the party, were actionable*, the learned counsel declined arguing the point, and the rule was made absolute [a a].

Whatever of doubt might, notwithstanding the previous authorities, seem still to have attached to this question, has been removed by the decision in the Exchequer Chamber, in the case of *Thorley v. Lord Kerry* (t). Lord Kerry, (the plaintiff below and defendant in error,) founded his action upon a libel, charging him with being a hypocrite, and with having used the cloak of religion for unworthy purposes. He obtained a verdict with £20 damages, and had judgment in the King's Bench without argument. A writ of [*163] error was brought in the Exchequer Chamber, and after very able arguments, in which all the previous authorities were considered, judgment was finally given for the defendant in error. Sir J. Mansfield, C. J. in delivering the opinion of the court,

[a a] In the case of the Archbishop of Tuam v. Robeson, 5 Bingh. 17, it was held, that to publish, in writing, of an archbishop, that he had attempted to convert a Catholic priest to become a Protestant clergyman, by offers of money and preferment was actionable. And Best, C. J. after observing, that in *Lord Kerry v. Thorley*, the distinction between oral and written slander had been established too firmly to be shaken, observed, "according to that case, in order to support such an action for oral slander, something criminal must have been imputed; but in a libel, any tendency to bring a party into contempt and ridicule is actionable, and in general any charge of immoral conduct, although in matters not punishable at law."

In the case of *Woodward v. Dowsing*, 2 M. & R. 74, Lord Tenterden said, "This is a case of written slander, in which shape, whatever tends to bring a party into public hatred and disgrace, is actionable. Can any man read this libel without saying that it charges the plaintiff with oppressive conduct? And therefore it was held, in that case, that a written charge against an overseer, of oppressive conduct towards paupers, in compelling them to receive payment of their weekly parish allowance in orders for flour on a particular tradesman was actionable, though the writer was mistaken, in supposing that the misconduct complained of was an offence within the stat. 55 G. 3. c. 139. s. 6.

In *Clement v. Chivis*, in error 9 B. and C. 172, it was held that it was libellous and actionable to publish of a coachman, that he had been guilty of gross misconduct, and had insulted two females and one gentleman, who were outside, in a barefaced manner.

(t) 4 Taunton, 355.

stated that the words, had they merely been spoken, would not have been actionable, and after expressly repudiating any distinction in principle between oral and written scandal, intimated that the judgment of the court in favour of the defendant in error, was founded entirely on the previous authorities, which established a rule too inveterate to be overturned (*u*). [1]

(*u*) His lordship, in giving judgment, observed,—“ There is no doubt that this was a libel for which the plaintiff in error might have been indicted and punished, because, though the words impute no punishable crimes, they contain that sort of imputation which is calculated to vilify a man, and bring him, as the books say, into hatred, contempt, and ridicule ; for all words of that description an indictment lies : and I should have thought that the peace and good name of individuals were sufficiently guarded by the terrors of this criminal proceeding in such cases. The words, if merely spoken, would not be of themselves sufficient to support an action ; but the question now is, whether an action will lie for these words so written, notwithstanding that such an action will not lie for them if spoken ; and I am very sorry it was not discussed in the Court of King’s Bench, that we might have had the opinion of all the twelve judges on the point, whether there be any distinction as to the right of action between written and parol scandal. For myself, after having heard it extremely well argued, and especially in this case by Mr. Barnewall, I cannot upon principle, make any difference between words written and words spoken, as to the right which arises on them of bringing an action. For the plaintiff in error, it has been truly urged that, in the old books and abridgments, no distinction is taken between words written and spoken. But the distinction has been made between written and spoken slander as far back as Charles the Second’s time, and the difference has been recognized by the courts for at least a century back. It does not appear to me that the rights of parties to a good character are insufficiently defended by the criminal remedies which the law gives, and the law gives a very ample field for retribution by action, for words spoken in the cases of special damage,—of words spoken of a man in his trade or profession,—of a man in office,—of a magistrate or officer ; for all these an action lies. But for more general abuse spoken, no action lies. In all the arguments, both of the judges and counsel, in almost all the cases in which the question has been whether what is contained in a writing be the subject of an action or not, it has been considered whether the words if spoken would maintain an action. It is curious that they have also adverted to the question, whether it tends to produce a breach of the peace, but that is wholly irrelevant, and is no ground for recovering damages. So it has been argued, that writing shows more deliberate malignity ; but the same answer suffices that the action is not maintainable upon

- *It is probable that in early times there was no difference, as far as concerned civil actions, between verbal and written slander ; no distinction *is made between them
- [*164]
- [*165] neither in the statutes of Scandalum Magnatum or in the older cases relating to the subject.

the ground of the malignity, but for the damage sustained. So it is argued, that written scandal is more generally diffused than words spoken, and is therefore actionable ; but an assertion made in a public place, as upon the Royal Exchange concerning a merchant in London, may be much more extensively diffused than a few printed papers dispersed or a private letter ; it is true that a newspaper may be very generally read, but that is all casual. These are the arguments which prevail on my mind to repudiate the distinction between written and spoken scandal, but that distinction has been established by some of the greatest names known to the law, Lord Hardwicke ; Hale, I believe ; Holt, C. J., and others. Lord Hardwicke, C. J., especially has laid it down, that an action for a libel may be brought on words written, when the words if spoken would not sustain it. Comyns Dig. tit. Libel, referring to the case in Fitzg. 122, 253, says, there is a distinction between written and spoken scandal, by his putting it down there, as he does, as being the law ; without making any query or doubt upon it, we are led to suppose that he was of the same opinion. I do not now recapitulate the cases, but we cannot, in opposition to them, venture to lay down at this day that no action can be maintained for any words written, for which an action could not be maintained if they were spoken ; upon these grounds, we think the judgment of the Court of King's Bench must be affirmed. The purpose of this action is to recover a compensation for some damage supposed to be sustained by the plaintiff by reason of the libel. The tendency of the libel to provoke a breach of the peace, or the degree of malignity which actuates the writer, has nothing to do with the question. If the matter were for the first time to be decided at this day, I should have no hesitation in saying, that no action could be maintained for written scandal which could not be maintained for the words if they had been spoken." See also the opinion of the judges in the case of *Macgregor v. Thwaites*, 3 B. and C. 24.

[1] It is worthy of remark, that at a period as late as 1812, when the case of *Thornley v. Lord Kerry* was decided, that the distinction as to the right of action between words *written* and words *spoken* should still have been the subject of discussion by counsel, and of solemn adjudication by the court. In the first action for a *libel* found in the books of reports of the State of New-York, viz : that of *Riggs v. Denniston*, 3 Johns. Cas. 198, decided in 1803. Chancellor KENT, then one of the judges of the Supreme Court, in pronouncing the judgment of the court, observed that the charges against the plaintiff were clearly libellous, *because they threw contumely and odium upon him in his char-*

The general rule was probably imported from *the [*166] civil law. Bracton lays down the law nearly in the language of the Institutes: *actio injuriarum competit ei qui contumeliam vel injuriam passus est* (x). It may be inferred, from the stat. of Circumspectè agatis, that in the reign of Ed. I. actions for damages, in the case of defamation, were common in the temporal courts (y). Whatever may have been the ancient rules of law (z), with regard to slander, they were afterwards relaxed (a) or contracted, as the courts deemed it convenient, until as far as regards oral slander, they were moulded into their present form.

There was, however, little necessity for visiting written or printed, as contradistinguished from oral slander, with either civil or penal censures, until the art of printing was invented, and learning had become more general. The offence of libel fell principally under the jurisdiction of the Star Chamber, which, in part at least adopted the rules of the civil law, and which, when that jurisdiction was abolished, were imported into the common law practice.

*The authorities already cited leave little to be said in [*167] relation to *the extent of the action* for slander communicated by means of writing, printing, pictures, or other signs.

acter as a commissioner of bankruptcy; instead of holding them actionable as subjecting the plaintiff to the *loss of his office*. Such has ever been the doctrine of that court ever since. In *Van Ness v. Hamilton*, 19 Johns. R. 367, Chief Justice SPENCER remarked, "It may, however, be observed in the outset, that there exists a decided distinction between *words spoken* and *written slander*. To maintain an action for a *libel*, it is not necessary that an indictable offence should be imputed to the plaintiff. If a libel holds a party up to public scorn, contempt, and ridicule, it is actionable,"

(x) Bracton de Actionibus, f. 104. Again, he says, *Facta puniantur ut furta, homicidia; scripta, ut falsa et libelli famosi*. Ib. f. 105.

(y) Et in causa diffamationis concessum fuit alias, quod placita illa teneantur in Curia Christianitatus dummodo non petatur pecunia sed agatur ad correctionem peccati.

(z) Vaughan, C. J. 2 Vent. 28, observes, "In the ancient books we do not meet with an action for words unless the slander concerned life."

(a) *Supra*, 12, 13, &c.

According to Lord Coke (*y*), every infamous libel is either *in writing*, or *without writing*. A scandalous libel in writing is, when an epigram, rhyme, or other writing, is composed or published to the scandal or contumely of another, by which his fame or dignity may be prejudiced.

Thus in the case of *Cropp v. Tilney* (*z*), already cited, Lord C. J. Holt said, that scandalous matter was not necessary to make a libel, that it was enough if the defendant induced an ill opinion to be had of the plaintiff, or made him contemptible and ridiculous. So according to the doctrine laid down in *Villars v. Monsley* (*a*), the publishing any thing concerning another which renders him ridiculous, or tends to hinder mankind from associating or having intercourse with him, is actionable. And, therefore, to publish in writing of another that he is a rogue or a rascal, swindler or villain, is actionable, although the terms would not have been actionable had they been merely spoken. So it is to tax a man by such means with want of honesty, civility, humanity (*b*) or veracity (*c*). [*a a*]

But where the defendants posted up, in a public room the following notice, "The Rev. J. Robinson (the plaintiff) and Mr. J. K., inhabitants of this town, not being persons that the proprietors or annual subscribers think it proper to associate with, are excluded this room:" it was held that the publication was not actionable. And the ground of this decision seems to have been this, that an imputation of such a nature is not actionable unless it represent the plaintiff as an improper person for *general* society, but that the alleged libel did not go to that extent; it merely asserted the opinion

(*y*) 5 Rep. 125. 3 B. & C. 33, 4.

(*z*) 3 Salk. 226. See also *Villars v. Monsley*, 2 Wils. 403. An action is maintainable for slander, either written or printed, provided the tendency of it be to bring a man into hatred, contempt or ridicule. Per Bayley, J. in *Macgregor v. Thwaites*, 3 B. & C. 33. (*a*) 2 Wils. 403.

(*b*) *Villars v. Monsley*. 2 Wils. 403. *J'Anson v. Stuart*, 1 T. R. 748. *Bell v. Stone*, 1 B. & P. 331. (*c*) Ray. 201.

[*a a*] It is no defence to an action for a libel tending to make a man ridiculous, that he himself told the same story to a party of friends. *Cook v. Ward*, 6 Bingh. 409.

of the defendants, that the parties excluded were not proper persons to be associated with by them, and that might proceed from reasons which did not at all affect or impeach the moral character of the parties (*d*).

*The libel *without writing* may be, 1st. By pictures, [*169] as to paint the party in any shameful or ignominious manner.

2ndly. By signs, as to fix a gallows, or other reproachful or ignominious signs, at the party's door, or elsewhere.

Upon the whole, it may be collected, that any writings, pictures, or signs, which derogate from the character of an individual, by imputing to him either bad actions or vicious principles, or which diminish his respectability and abridge his comforts, by exposing him to disgrace and ridicule, are actionable, without proof of special damage; in short, that an action lies for any *false, malicious, and PERSONAL imputation, effected by such means, and tending to alter the party's situation in society for the worse.*

This rule, though apparently very wide and comprehensive, cannot be considered to be more extensive than the justice of the case demands. No man, abstractedly, has a right to lessen the comforts or enjoyments of another; and when he does it deliberately, wantonly, and maliciously, it would be an insult to common sense to contend, that he is not bound, upon the plainest grounds of policy and justice, to make compensation for the mischief so occasioned: and no inconvenience can result from the rule; it must be recollected, that the only question at *present is, [*170] as to the nature of the damage which must have been sustained to make the scandal actionable: this damage is, however, but one of two essential requisites for the supporting an action. To render the right complete, such damage must have been occasioned, as will afterwards be seen, by the malicious act of the defendant. This further requisite, of *malice*, that is of malice in the *legal sense* of the term, precludes litigation in all cases where

(*d*) As by publishing of a tradesmen, that he shoots out of a leathern gun. *Herman v. Delany*, 2 Str. 898. *Raymond*. 289. *Fitzg.* 121.

(*e*) *Robinson v. Jermyn*, 1 Price, 11.

the party has acted in the discharge of any legal or moral duty, or in the fair and conscientious performance of his part in any transaction arising out of the ordinary business of life, without a deviation for malevolent purposes, and confines the action to those instances in which the mischief is attributable either to mere malice of heart, or to a wanton and guilty disregard of the feelings and interests of others.

It is said, by the learned author of the commentaries, that (*f*), "as to signs or pictures, it seems necessary always to show, by proper innuendos and averments of the defendant's meaning, the import and application of the scandal, and that *some special damage has followed* ; otherwise it cannot appear that such libel by pictures, was understood to be levelled at the plaintiff, or that it was attended with *any actionable consequences*." It [*171] seems, however, to be very *difficult to conceive any sound distinction between written and painted libels.

A man may be as successfully exposed to ridicule by a caricature painting, as by any written misrepresentation ; and the object of the defendant may be as clearly manifested in the latter case, as the former. The difficulty, indeed, of proving the plaintiff to be the person aimed at, may, in some instances, be greater in the latter case ; but when the doubt as to the defendant's application of the calumny has been overcome, there seems to be no room for further distinction.

The pencil of the caricaturist is frequently an instrument of ridicule more powerful than the press ; and it is not easy to conceive an imputation which an ingenious artist would not be able successfully, to communicate to minds of even the meanest capacity. A man may be effectually held up as the object of ridicule, contempt, or hatred by means of a picture, as by the most laboured form of words : in legal consideration, the only question is, whether the mode of defamation which has been adopted be capable of conveying that meaning which is detrimental to the plaintiff ? If, in fact, such modes be equally distributable, and equally durable,—in short,

equally mischievous in every respect, they cannot be considered as distinguishable, for legal *purposes, upon any [*172] principle of reason and good sense ; and no such distinction is to be found in the reports. It was expressly held by Holt, C. J. that “ In case upon libel it is sufficient if the ‘matter be reflecting (*g*) ; as to paint a man in any disgraceful situation.”

The plaintiff (*h*) brought an action of trespass against the defendant for destroying a picture of the plaintiff’s. Upon the trial it appeared that the picture in question, entitled *La Belle et La Bête*, was a caricature representation of a gentlemen and his wife, who was sister to the defendant, and that it had been publicly exhibited for money till the defendant cut it in pieces. The plaintiff insisted that he was entitled to the full value of the picture, together with a compensation for the loss of the exhibition. The defendant contended that it was a public nuisance, which every one had a right to abate by destroying the picture.

Lord Ellenborough, C. J. “ The only plea upon the record being the general issue of ‘ not guilty,’ it is unnecessary to consider whether the destruction of this picture might or might not have been justified. If it was a libel upon the *persons [*173] introduced into it, the law cannot consider it valuable as a picture. Upon an application to the Lord Chancellor, he would have granted an injunction against its exhibition ; and the plaintiff was both *civilly* and *criminally* liable for having exhibited it.” [1]

There remains a class of communications differing from those last adverted to, and which, though accompanied with circumstances of cooler deliberation and more settled purpose than words merely spoken, are not calculated to produce such lasting and widely extended consequences as those effected by writings or pictures.

The vulgar custom of riding Skimmington (*i*) and the practice of

(*g*) 11 Mod. 99. See also 2 Hawk. Pl. C. c. 73. s. 2. 5 Co. 125. Skinner, 123. 3 Keb. 378.

(*h*) *Du Bost v. Beresford*, 2 Camp. Rep. 511.

[1] See *Eden on Injunctions*, ch. 14, where the opinion of Lord Ellenborough as to the granting of an injunction is questioned, and the cases on the subject reviewed.

(*i*) *Supra*. See Lord Holt’s dictum in *Cropp v. Tilney*, 3 Salk. 226. And

carrying or burning the effigies of persons intended to be held out as public objects of disgrace and ridicule, are instances of this description. The impressions made by such proceedings are naturally more lasting, and are likely to produce a greater degree of mischief than words merely spoken ; and yet the calumny is not so durable as if it had been conveyed in print or in writing.

[*174] As, however, these are means by *which a man may be rendered, in many instances, contemptible and ridiculous, and in others may be exposed to the serious effects of popular indignation and resentment,—as the act of the defendant is more studied and deliberate, and the consequences more mischievous than those likely to be occasioned by mere oral slander, it seems to be clear that such representations are actionable, as falling within the same consideration with the other cases which have formed the subject of the present chapter.

Thus an action has been supported for setting up a lamp adjoining to the dwelling-house of the plaintiff, and keeping it burning in the day-time, with intent to defame the plaintiff as the keeper of a brothel. (*k*)

see *Austin v. Culpepper*, 1 Show. 314, where the court cited the case of *Sir William Bolton v. Dean*, where an action was maintained for scandalizing the plaintiff, by carrying a fellow about with horns, bowing at the plaintiff's door, &c.

(*k*) *Jeffries v. Duncombe*, 11 East, 226, and see *Spall v. Massey*, 2 Starkie's C. 559.

CHAPTER VI.

OF SCANDALUM MAGNATUM.

WORDS spoken in derogation of a peer or judge, or other great officer of the realm, are usually called *Scandalum Magnatum*; and though they be such as would not be actionable when spoken of a private person, yet when applied to persons of high rank and dignity, they constitute a more heinous injury, which is redressed by an action on the case founded on many ancient statutes, as well on behalf of the crown, to inflict the punishment of imprisonment on the slanderer, as on the behalf of the party to recover damages (a) for the injury sustained.

Under this division will be considered,

1. The grounds of the action.
2. The parties entitled to maintain it.
3. The nature of the words which will support it.

The statute (b) 3 Ed. 1. c. 34. after premising *that [*176]
“Forasmuch as there have been oftentimes found in the country devisors of tales, whereby discord, or occasion of discord, hath many times arisen between the king and his people, or great men of the realm,” enacts, “that from henceforth none be so hardy to tell or publish any *false news* or tales, whereby discord, or occasion of discord, or slander, may grow between the king and his

(a) 3 Blac. Com. 123.

(b) For the history of these statutes, see 2 Mod. 152. Barrington on the Penal Statutes. 3 Reeve's Hist. and 1 Parl. Hist.

people or the great men of the realm ; and he that doth so, shall be taken and kept in, until he hath brought him into court which was the first author of the tale.”

By 2 R. 2. st. 1. c. 5. “ Of devisors of *false news* and of *horrible and false lies*, of prelates, dukes, earls, barons, and other nobles and great men of the realm ; and also of the chancellor, treasurer, clerk of the privy seal, steward of the king’s house, justices of the one bench or of the other, and of other great officers of the realm, of things which by the said prelates, lords, and officers aforesaid, were never spoken, done, nor thought, in great slander of the said prelates, lords, nobles, and officers, whereby debates and discords might arise betwixt the said lords, or between the lords and commons (which God forbid), and whereof great peril and mischief might come to all the realm, and quick subversion and destruction

of the said realm, if due remedy be not provided. It is [*177] straitly defended upon grievous pain, for to eschew the said damages and perils, that from henceforth none be so hardy to devise, speak, or to tell any false news, lies, or other such false things, of prelates, lords, and of others aforesaid, whereof discord or any slander might rise within the said realm ; and he that doth the same shall incur and have the pain another time ordained thereof by the statute of Westminster the first, which will, that he be taken and imprisoned till he have found him of whom the word was moved.”

Also by the 12 R. 2. c. 11.—“ Item. Whereas it is contained as well in the statute of Westminster the first, as the statute made at Gloucester, the second year of the reign of our Lord the king that now is, that none be so hardy to invent, to say, or to tell any false news, lies, or such other false things, of the prelates, dukes, earls, barons, and other nobles and great men of the realm, and also of the chancellor, treasurer, clerk of the privy seal, and stewards of the king’s house, the justices of the one bench or of the other, and other great officers of the realm ; and he that doth so shall be taken and imprisoned till he hath found him of whom the speech shall be moved. It is accorded and agreed in this parliament, that when any such is taken and imprisoned, and cannot find him by whom

the speech be moved, as before is said, that he *be punished* by the advice of the council, notwithstanding the said statutes."

*It does not appear to be very clear, whether, before [*178] these statutes, any words would have been actionable when applied to a peer or other person of high rank and dignity, which would not have been deemed so in the case of a private person (c)

In the case of *Ld. Townsend v. Dr. Hughes* (d), the words were, "He is an unworthy man, and acts against law and reason;" and Scroggs and Atkins, justices, were of opinion that by the Common Law no action would lie, though such words were spoken of a peer; but North, C. J. considered the words to have been actionable at Common Law; and held, that no words would be actionable under the statute which were not so at Common Law.

Whether such a distinction prevailed or not at Common Law, is at present a matter of curiosity rather than of practical importance, for it has been established by a long train of decisions, that the distinction, if not created, has at all events been considered as warranted, by the operation of the statutes alluded to.

Upon these it has been held, that a remedy by action has been given to the great men of the realm, entitling them to a compensation in damages for injurious reflections upon their character, *though the statutes themselves no not in express [*179] terms profess to bestow such a remedy. And this doctrine is founded upon the general rule, that whenever (e) a party is prejudiced by the doing of that which is prohibited by statute, he is entitled to damages. It is a remarkable circumstance, that from the time of passing the st. 12 Rich. 2, no civil action appears from the reports to have been founded upon it before the (f) thirteenth year of Henry the Seventh, comprising an interval of more than a century.

2. Next as to the parties entitled to maintain this action.

As the statute 2 R. 2. st. 1. c. 5, commences with an enumeration of persons inferior in rank to the king, it has been held, that

(c) See Buller L. N. P. 4. and 12 Co. 133.

(d) 2 Mod. 150.

(e) Keil. 26.

(f) *Ld. Townsend v. Dr. Hughes*, 2 Mod. 162. 10 Co. 75.

the latter is not included (*g*) within the general words, "and great men of the realm." But (*h*) that he is included within the first of Westminster.

The action has been adjudged to extend to orders of nobility created since the making of these statutes ; so that although the stat.

2 R. 2, specifically mentions dukes, earls, and barons
[*180] only, a viscount (*i*) has been considered to be *entitled to the action, though the title is of much (*k*) later creation.

It has been said (*l*), that a female, noble by birth, is not within the statute ; but it is difficult to say upon what principle a peeress is excluded from the benefit of this statutable protection.

As the words derive their actionable essence from their application to the dignitaries specified in the statute, it must appear that the plaintiff held his rank at the time when the words were published (*m*).

By the act of union (*n*) with Scotland, it is enacted that all peers of Scotland shall also be peers of Great Britain, and enjoy all privileges as fully as peers of England, except of sitting in the House of Lords and the privileges depending thereon. Under this clause it has been determined, that a peer of Scotland is one of the magnates (*o*) to whom this statute extends ; and it was said, that though it had been customary in such action to aver that the plaintiff had a *vote and seat in parliament*, such an averment was superfluous.

[*181] *It seems that the action is maintainable by a Baron (*p*) of the Exchequer, though the statute mentions only Justices of the one bench or the other.

3. What words will support the action.

The grounds of the action and the effect of these statutes, underwent much learned discussion in the case of *Lord Townsend v. Dr.*

(*g*) Crompt. Jur. 19. 35. 6 Bac. Ab. 97. 12 Co. 133.

(*h*) 12 Rep. 133.

(*i*) Cro. Car. 136. Palm. 165.

(*k*) John Beaumont, the first Viscount, was created such 18 H. 6.

(*l*) Crom. Jur. 35. 6 Bac. Ab. 97.

(*m*) Vent. 60.

(*n*) 5 Ann. c. 8. Art. 23.

(*o*) Lord Falkland *v.* Phipps, Comyn's Rep. 439. 1 Vin. Ab. 549. pl. 22.

(*p*) Vid. Pal. 565. 12 Co. 133.

Hughes (*q*), which has been already referred to. The action was there brought for speaking the words, "He is an unworthy man, and acts against law and reason." Upon not guilty pleaded, the cause was tried, and the jury gave 4000*l.* damages. Upon motion in arrest of judgment, Serjeant Maynard, for the defendant, allowed that it was too late to contend that an action to recover damages was not maintainable under the statutes of Scandalum Magnatum, upon the principle before mentioned, that where a statute prohibits a thing prejudicial to another, the person prejudiced is entitled to recover damages; but he insisted that the words were not within the meaning of the acts; because, the term *unworthy* imported no particular crime,—that it was merely a term of comparison, and that instances of unworthiness might be alleged which would *not support an action; but that, if the plaintiff [*182] had been compared to any base and unworthy thing, the words would have been actionable: as in the *Marquis* (*r*) of *Dorchester's* case, of whom the defendant said, "There is no more value in him than in a dog." That to say a man acts against law and reason, is no scandal; a man who buries one of his family in linen acts against law, but that, if the penalty be satisfied, the law is so too. That no instance was given in which the plaintiff had acted against law, and therefore that the case was unlike the *Duke* (*s*) of *Buckingham's*, who brought an action for the words, "You are used to do things against law, and put cattle into a castle where they cannot be replevied;" for in that case, not only an usage was charged upon him, but a particular instance of oppression. That the words in question were uncivil, but not actionable,—that there were many authorities which shewed a peer not entitled to an action for every trivial and slight expression spoken of him. As to say of a peer, "He keeps none but rogues and rascals about (*t*) him, like himself," which words, in the opinion of Yelverton and Fleming, Justices, were not actionable. *That the statute was [*183] made to punish those who devised "false news, and horrible and false lies of any peer," &c. whereby discords might

(*q*) 2 Mod. 150.(*s*) Hil. 16 C. 2. Roll. 1269.(*r*) Crom. Jur. of Courts.(*t*) Earl of Lincoln's case, Cro. J. 196.

arise between the lords and commons, and great peril and mischief to the realm, and quick subversion thereof. But that it could not be contended, under the fair construction and intent of the act, that if one should say, "Such a peer is an unworthy man," the kingdom would be presently in a flame, and turned into a state of confusion and civil war; or, that the state would be endangered by saying of a peer, "he acts against the law." That the plaintiff was placed in no hazard by the words, nor in any wise damnified; he was not touched in his loyalty as a peer, nor in danger of his life as a subject; he was not thereby subjected to any corporeal or pecuniary punishment, nor charged with any breach of oath, nor any miscarriage in office.

It was answered by Pemberton, Serjt. that it was the end and object of these statutes to give a remedy against all *provoking* and *vilifying* words which were used before to exasperate the peers, and to make them betake themselves to arms, and to carve out their own remedy by the sword. That since the design of the statute was to prevent such practices, not only those words were to be considered as falling within their scope, which imported *great scandal*, [*184] and for which an action lay at the common law, but even such things as savored of any contempt of their persons, and such as brought them into disgrace with the commons, whereby they took occasion of prosecution and revenge. And he cited *Lord Cromwell's* case (*u*), where the words were, "You like those who maintain sedition." *The Earl of Lincoln's* case, "My lord is a base carl, and a paltry carl, and keepeth none but rogues and rascals like himself."

The *Duke of Buckingham's* case (*x*), "He has no more conscience than a dog."

The *Marquis of Dorchester's* case, "He is no more to be valued than the black dog that lies there."

All which words had been held to be actionable, though not touching the persons in any thing concerning the government, nor charging them with any crime, but in point of dignity and honour.

Scriggs, J. observed, that "the words here laid are not so bad

(*u*) 4 Co. 13. Cro. J. 196.

(*x*) Hil. 16. c. 2. Roll. 1269.

as the defendant might have spoken, but they are so bad that an action will lie for them ; and though they are *general*, many cases may be put of general words which import a crime, and which have been adjudged actionable."

* In the *Earl of Leicester's* case, "He is an oppressor," were held actionable. [*185]

And in *Lord Winchester's* case, "He kept me in prison, till I gave him a release," were deemed to be actionable, because the plain inference from them is, that he was an oppressor.

And so, in *Lord Abergavenny's* case, "He sent for me, and put me in Little Ease." It appears by all these cases, that the judges have always construed in favour of these actions ; and this has been done in all probability to prevent those dangers which otherwise might ensue if the lords should take revenge themselves."

Atkyns, J. held, that under the construction of the statute, the words to be actionable must be *horrible* as well as *false*, and such as were punishable in the high commission court, which were enormous crimes. That the statute did not extend to words of a small and trivial nature, nor to all words which were actionable, but only to such as were of a greater magnitude, such by which discord might arise between the lords and commons, to the great peril of the realm, and such which are great *slanders* and *horrible lies*, which are words purposely put into this statute for the aggravation and distinction of the crime ; and, therefore, such words as were actionable at the common law might not be so within this statute, because not horrible great scandals. The learned *judge [*186] also observed, that in the *Duke of Buckingham's* case (y), (which was the second which appears to have been determined in an action on the statute.) where the defendant said, "You have no more conscience than a dog ;" and in the case of *Lord Abergavenny v. Cartwright*, "You care not how you come by goods," the words charged the plaintiff with particular matter, and did not rest barely upon opinion.

That in the case of the *Bishop of Norwich* (z), the words, "you

(y) 4 Hen. 8. Crompt. Jur. 13.

(z) Cro. Eliz. 1.

have writ to me that which is against the word of God, and to the maintainance of superstition," were held actionable, because they refer to his function, and greatly defame him. That in the case of *Lord Mordant v. Bridges (a)*, the words "My Lord Mordant did know that Prude robbed Shotbolt, and bade me compound with Shotbolt for the same ; and said, he would see me satisfied for the same, though it cost him an hundred pounds, which I did for him, being my master, otherwise the evidence I could have given would have hanged Prude," were held actionable ; and that both in this, and in all the other cases which had been mentioned on the statute, and where judgment had been given for the plaintiff, the words had always charged him *with some particular fact, and were

[*187] positive and certain ; but that where they were doubtful and general, and signified only the opinion of the defendant, they were not actionable. That the words in the case at bar neither related to the plaintiff as a peer, nor as a lord lieutenant, and charged him with no particular crime ; and that if the laws were expounded to rack people for words, instead of remedying one mischief, many would be introduced ; for in such case they would be made snares to men. He farther said, that it was fit the law should be settled by some rule, because it is a wretched condition for people to live under such circumstances as not to know how to demean themselves towards a peer ; and that since no limits had before been prescribed, it was fit there should be some then, and that the court should go by the same rules in the case of a peer as in that of a common person ; that is, not to construe the words actionable, without some particular crime charged upon the plaintiff, or an allegation of special damage.

North, C. J. and Wyndham, J. agreed with Scroggs, the former being of opinion, that all words reflecting upon a peer, as he is the king's counsellor, or as he is a man of honour and dignity, are actionable at the common law. That in many cases where a man should express his particular disesteem, an action would

[*188] not lie, as if he *had said, "I care not for such a lord," but that words of general opinion and disesteem were ac-

tionable, as was held in the *Marquis of Dorchester's* case (b) ; and, by the opinion of North, C. J. and Wyndham and Scroggs, Justices, judgment was given for the plaintiff.

And in the case of the *Earl of Pembroke v. Staniel* (c), the words were, "The Earl of Pembroke is of so little esteem in the country, that no man of reputation hath any esteem for him ; he is a pitiful fellow, and no man will take his word for two-pence, and no man of reputation values him more than I do the dirt under my feet ;" and they were held to be actionable under the statute, though they would not have been so in the case of a private person.

And in the case of *Ld. Falkland v. Phipps* (d), the terms villain, villainous rogue, scrub, and scoundrel, were held actionable.

From these cases it appears, that *general expressions of contempt and disesteem, tending to degrade and vilify the characters of peers and great officers of the realm*, are actionable, as well as those which impeach their loyalty, or impute the commission of any criminal and disgraceful fact. *Where words are spoken of a peer, which would be actionable as spoken of a private person, the plaintiff has it at his option (e) to proceed either upon the statute, or in the usual form of action.

The incidents peculiar to Scandalum Magnatum, as relating to the process, pleading, justification, &c. will be considered in common with the corresponding ones belonging to the proceeding at common law.

(b) 1 Sid. 293.

(c) Freem. Rep. 49. 1 Vin. Abr. 549.

(d) Comyn's Rep. 449.

(e) Per Twisden. Freem. Rep. 49. pl. 58.

CHAPTER VII.

SPECIAL DAMAGE.

*THUS far as to damage in law, that is, as to those communications which are deemed to be of so hurtful a nature, that the law *presumes* a consequent damage without actual proof. In all other cases, some actual specific damage, in fact, is essential to support an action.

Here two questions arise,

1. What, in legal contemplation, amounts to an actual damage?
2. How must such damage be connected with the slander, to constitute a ground of action?

1. *What, in legal contemplation, amounts to an actionable damage?*

The defendant's act affects either rights already acquired, or prevents the acquisition of some further benefit or advantage.

Where the plaintiff has been wrongfully charged with the commission of some crime, if the imputation rest as a bare charge, not officially made in the usual course of a criminal proceeding, the party, it seems, has a right to consider *the expense and labour to which he is put for the purpose of manifesting his innocence as special damage.

As where the plaintiff, in consequence of an insinuation that he was guilty of murder, was obliged to have an inquest taken on the body of the deceased (*f*).

(*f*) Per Lord Mansfield. *Peake v. Oldham*. Cowp. 277.

But if the defendant proceed according to the usual forms of criminal prosecution, though the plaintiff is entitled to recover damages for the scandal, vexation, and expense, brought upon him by an unfounded and malicious accusation, he must proceed either by an action of conspiracy or by a special action on the case, founded upon the criminal proceeding itself, and cannot recover (as will afterwards be seen) in a common action for any scandalous matter published in the course of such a prosecution (*g*).

Where a party is prevented from selling, exchanging, or making any advantageous disposition of lands, or other property, in consequence of the impertinent interference of the defendant, he may maintain an action for the inconvenience which he has suffered, but special damage must be shown; and the mere apprehension (*h*) that "in consequence of the slander, the [*192] plaintiff's title may be drawn in question, will not support an action.

And it is not sufficient to show generally that the plaintiff intended to sell to any one that would buy, but he must prove that he was in treaty to sell them to some specific person (*i*), or at least that some one was deterred by the slander from making an offer. Neither will it suffice to show, that the value of the lands was lessened in people's opinions, but proof must be given of damage actually sustained. Where the alleged loss consists in the prevention of the sale of lands, it must appear that the words directly tended to defeat the plaintiff's title (*k*).

In *Sir W. Gerrard v. Dickerson* (*l*), it was said by Wray, C. J. that in all cases where one doth entitle a stranger, it is not actionable, except it be shown that some damage comes to the proprietor by it, viz. that he cannot let it or sell it, &c.

The defendant said (*m*), "M. has mortgaged all his lands for

(*g*) 3 Bl. Com. 126. 10 Mod. 210, 219, 220. Str. 691.

(*h*) Cro. Eliz. 197. 1 Vin. Ab. 550. pl. 6. Yelv. 80. Cro. J. 642, contra. Et vide Cro. J. 397. Sir W. Jones, 196.

(*i*) *Manning v. Avery*, 3 Keb. 153.

(*k*) Burr. 2622.

(*l*) Cro. Eliz. 196.

(*m*) *Manning v. Avery*, 3 Keb. 153. 1 Vin. Ab. 553. pl. 21. Sty. 169. 176. Palm. 529.

£100, and has no power to sell or let the same." And,
 [*193] because no special damage nor particular "colloquium
 was laid of a treaty to sell them to any person certain,
 but only in general that he intended to sell it to any one that would
 buy, which is too general, judgment was stayed.

In *Elbrow v. Allen* (n), the action was brought for the words,
 "He is but a bastard," spoken of the plaintiff, who had lands by
 descent; by means of which he was put to great expense to de-
 fend his title. And two of the justices, against the opinion of Dod-
 deridge, J. decided, that the words were actionable, the plaintiff
 having averred in his declaration that he was put to a great charge
 to defend his inheritance (o).

[*194] *And next, where the plaintiff is prevented from ac-
 quiring some benefit or advantage.

In general, where the plaintiff is *hindered*, by the mere wrongful

(n) Cro. J. 642.

(o) But it has been held, that to institute a civil suit, though there be no
 good ground for it, is not actionable, because it is a claim of right for which
 the plaintiff has found pledges, is amerciable pro falso cramore, and is liable to
 costs, and therefore that no action lies, unless the defendant be maliciously
 sued*, with intent to imprison him for want of bail.

And it may be urged that the plaintiff is precluded from recovering from the
 person who spoke the words which brought his title into litigation, since, in
 contemplation of law, he has been already satisfied for the false claim.

There is, however, a distinction between an action against a former plaintiff,
 for making a false claim, and an action against one who, by a false and mali-
 cious suggestion, caused him to assert the false claim, in order to involve the
 former defendant in litigation; for such a party has, by his malicious and im-
 pertinent act, subjected another to the trouble and anxiety of a suit, and being
 a wrong-doer, who has no colour of right, he stands in a different situation from
 the plaintiff in the former suit, who merely sought a remedy by legal means;
 and to constitute special damage, it is by no means essential that any legal right
 should have been abridged. One who does no more than the law permits may
 not be liable, and yet one who, by undue means, caused him so to act, may be
 responsible. Thus, if A. slander B. in a discourse with C., the patron of a
 living, and C. in consequence refuse to present B., no action lies against C.,
 but an action lies against A., though B. never had any legal claim, and has lost
 no right defined by the law.

* See *Saville v. Roberts*, 1 Salk. 13. 4 Co. 9 Co. 56. b. 1 Roll. Abr. 112.

act of the defendant, from succeeding to any *preferment, benefit or advantage* whatever, he may maintain an action for the special damage.

As, if a patron (*p*) intend to present a divine to a benefice, and the defendant say of him, "He is an heretic, or a bastard;" for which reason the patron refuses to present him, and he loses his preferment, an action is maintainable.

So, if the defendant say of a candidate for an office, that he is an ignorant man and unfit for the place, by means of which he loses it, an action lies (*q*). [1]

(*p*) 4 Co. 16.

(*q*) March. Rep. pl. 217. 1 Buls. 138.

[1] Whether at this day, without proof of *express malice*, it would be held libellous in this country, or in England, thus to speak of a *candidate for office*, may well be doubted. The law recognizes what are called *privileged communications* relating to matters affecting the government, its laws, policy, and the administration of public affairs, the social relations of life, and the ordinary transactions of business; in either case it protects from liability in a civil action the authors of such communications, although erroneous in fact, provided they acted upon an occasion warranting the communications, in good faith and without the intent of effecting mischief—the law presuming the *innocence* of the author, until the contrary be shown by proof of *express malice*. Accordingly all communications made in the discharge of duty, public or private, legal or moral, are protected. If the communication of an individual, in a matter of private business, made in good faith and without malice, to another having a common interest in the subject matter, is protected, although it injuriously and erroneously assails the character of a third person, assuredly, a communication whether oral or written, discussing the character, talents or qualifications of a candidate for office, addressed to the constituency whose suffrages are solicited, by individuals having a common interest in the matter, must be deemed a *privileged communication*.

In conformity with these views it has been held in *South Carolina* in the case of *Mayrant v. Richardson*, 1 Nott and McCord 327, that an action of slander would not lie for a publication in reference to a candidate for the office in which it was alleged that the *mind of the candidate was impaired*. Judge Nott observed, when a man becomes a candidate for public honors, he makes *profert* of himself for public investigation. No one has the right to impute to him infamous crimes or misdemeanors; but talents and qualifications are mere matters of opinion, of which the electors are the only judges. So in the case of *The Commonwealth v. Clapp*, 4 Mass. R. 163, Chief Justice PARSONS held substantially the same doctrine. "When any man," he says, "shall consent

[*195] *So, where a servant or bailiff is prevented from getting a place (r).

Loss of marriage seems to have been always considered as a temporal damage (s), although the words themselves have imputed matter of mere spiritual cognizance.

to be a candidate for public office, conferred by the election of the people, he must be considered as putting his character in issue so far as may respect his fitness and qualifications for the office." Although at the period of pronouncing judgment in this case the *truth* could not be given in evidence, in Massachusetts, in justification of a libel criminally prosecuted, the C. J. held that "publications of the truth on *this subject*, with the honest intention of *informing the people*, are not libellous, for it would be unreasonable to conclude that the publication of truth, which it is the interest of the people to know, should be an offence against those laws" In *Onslow v. Horne*, 2 Wm. Black. 750, which was an action for words spoken of a member of Parliament, at a public county meeting, held for the purpose of considering of measures to be taken in support of the right of election, it was moved, in arrest of judgment, that if the words were actionable in themselves, the *occasion of speaking them* would excuse the defendant, they having been uttered at a public county meeting where freedom of debate is necessary. The Court of King's Bench acknowledged the importance of the question, but declined expressing an opinion upon it. Chief Justice DE GREY observed, "As we think the words in the last count (the words in question) are not actionable, either in themselves or as applied to a member of Parliament, we shall give no opinion *how far such an occasion as the meeting stated in the declaration would or would not justify speaking such words as would otherwise be clearly actionable.*"

The question whether a communication in respect to a candidate for office is privileged, was expressly raised in *Duncombe v. Daniel*, 8 Carr. and Payne, 213, decided in 1837. That was an action for a *libel*; the plaintiff declared upon two letters written by the defendant and published in the *Morning Post* newspaper, addressed to the plaintiff, who was a candidate for the representation of the borough of *Finsbury*, in the British Parliament. The defendant was an elector of the borough. The letters contained two charges: 1. Imposition and fraud upon the Vice Chancellor in obtaining an injunction; and 2. dishonorable and dishonest conduct relative to a money transaction; and called upon the plaintiff for an explanation at the hustings. Sir W. Follett, for the defendant, submitted that, as the plaintiff was a candidate for the representation of the borough, and the defendant an elector, the latter was justified in stating

(r) Shepp. Coll. 192.

(s) *Davis v. Gardiner*. 4 Co. 16. Roph. 36. 1 Roll. Rep. 34, 35, 109. Mo. 409. Cro. Car. 155. Case of Sir C. Gerald's bailiff. Bull. N. P. 7.

In *Mathews v. Crass* (t), which was an action for words, occasioning loss of marriage; after verdict for the plaintiff, it was urged,

(t) Cro. Jac. 323.

to the other electors the imputations complained of, if he did so *bona fide* and *without malice*, believing the imputations to be true. Lord DENMAN, C. J., charged the jury that it appeared to him that the occasion did not justify the publication, and the plaintiff had a verdict. At the next term, application was made for a new trial on the ground (*inter alia*.) that it was justifiable for an elector *bona fide* to communicate to the constituency any matter respecting a candidate which he believed to be true and material to the election. The principle was conceded by the court to be correct, but was held inapplicable because the communication had not been confined to the constituency of the plaintiff, but had been published in the *Morning Post*. When Sir W. Follett stated as above, the ground of his application for a new trial, COLERIDGE, J. remarked, "You must go farther than that, and make out that the elector is entitled to publish it to *all the world*. This publication was in a newspaper." Lord DENMAN, C. J., also after hearing counsel, observed, "However large the privilege of electors may be, it is extravagant to suppose that it can justify the publication to *all the world* of facts injurious to a person who happens to stand in the situation of a candidate."

On the other hand, when at a very early day it was said of a candidate for a public office, "he is an ignorant man and not fit for the place," the judges in England, after the case had been twice argued, *seemed inclined to the opinion* that the words were actionable, but no judgment was given, *Saunderson v. Ruddes*, March's R. 146, pl. 217, decided in 17 Car. I. Anno Domini 1642. The other case cited in the text, viz. 1 Buls. 138, is that of *Simpson v. Brooks*, decided in 1612. It was an action for saying of the plaintiff, "he is not worthy to bear office in such a place, for he keeps a bawdy house in London." The jury found for the plaintiff, and the defendant moved *in arrest of judgment*, that the words were not *per se* actionable. It is not stated in *Bulstrode* that the plaintiff was, at the time of the speaking of the words, a candidate for office; but, admitting him to have been a candidate, the question whether the defendant was liable in an action for damages, if a constituent of the plaintiff, and the words were spoken in *good faith*, in the belief of their truth, and *without malice*, could not have arisen on a motion in arrest. The next case on this subject, in England, in point of time, is *Harwood v. Astley*, 4 Bos. Pul. 47, decided in 1804, which was brought into the Exchequer Chamber on writ of error from the King's Bench. Astley declared that he was a candidate for election as one of the knights of the shire, to represent the county of Norfolk in Parliament, and that with the intent to prejudice him in the esteem of the freeholders of the county having a right to vote. Harwood *falsely* and *maliciously* charged him

on motion in arrest of judgment, that this was the first case where loss of marriage was ever laid for words spoken of a man, and there-

with being a murderer, and with having murdered his own father. The defendant pleaded *not guilty*, and the plaintiff obtained a verdict for £2000 damages. The defendant sued out a *writ of error*, and the judgment was affirmed. SIR JAMES MANSFIELD, C. J., who delivered the opinion of the court, held that the words were actionable in themselves, and being so, it was immaterial whether they were spoken of a *candidate for office* or not ; that it was impossible for the jury conscientiously to have found a verdict for the plaintiff unless they believed that the defendant was guilty of *maliciously* speaking the words. He added, " It seems to be supposed that the situation of a candidate for parliament, is such as to make it lawful for any man to say any thing of him." To that proposition, he said " I cannot assent ; nor is it to be collected from any of the cases which have been cited. It would be a strange doctrine indeed, that when a man stands for the most honorable situation in the country, any person may accuse him with any imaginable crime with impunity." This case at first blush, would seem to dispose of the question, but on looking at it more closely, it will be found not to do so. As the case came before the court on writ of error, no other judgment than that of *affirmance* could possibly be rendered. The charge against the plaintiff was truly of a most atrocious nature ; yet if made in *good faith*, believing it to be true, the defendant had a right to make it, and to apprise his fellow electors of the character of the plaintiff as he believed it to be, and the law would presume him to be innocent of all wrong, until such presumption was rebutted by proof of *express malice* ; and we are bound to presume that such proof was given, or the jury, as the C. J. remarked, would not have found that the words were *maliciously spoken*. This case therefore, as before remarked, settles nothing.

The cases upon this subject which have arisen in the Supreme Court of the State of New-York and *Lewis v. Few*, 5 Johns. R. 1 ; *Root v. King*, 7 Cowen 617 ; *Powell v. Dubois*, 17 Wendell 63 ; *Cramer v. Riggs*, 17 Id. 209 ; and *Turrill v. Dolloway*, 17 Id. 426, and 26 Id. 383, S. C.

Lewis v. Few was an action for an alleged libel contained in " An Address to the electors of the State of New-York," on the occasion of a general election when the plaintiff was a candidate for re-election to the office of Governor. It was insisted by the counsel for the defendant, that considering the nature of the publication, and the right of the citizen freely to discuss the character, principles and conduct of a candidate for office, the plaintiff was not entitled to sustain the action, unless he proved *express malice* ; and that having failed to do so, he was not entitled to recover. The court denied this position, and held that the malice *implied* from the falsity of the publication, was sufficient to sustain the action ; thus virtually holding that a publication of this kind was not entitled to be considered as a *privileged communication*. The same doctrine

fore was not warranted by *Ann Davis's* case (*u*). But the court conceived it to be immaterial, in case of loss of marriage, whether the plaintiff be a man or a woman.

In order to support an action grounded upon the loss of marriage it is necessary for the plaintiff to allege and prove that a marriage with some specific person (*x*) was in contemplation, and 'was hindered by the speaking of the words.

*The necessity of proving a specific loss, falls with peculiar hardship upon unmarried females, who are thereby frequently debarred from maintaining actions for imputations most unfounded and injurious. In no other case can it be more fairly presumed that the scandal, if believed, will produce detriment, than where an unmarried female is charged with incontinence: and therefore, in no other case is the plaintiff better entitled, in reason and good sense, to the benefit of that presumption, in order to obtain a remedy for the scandal, and, which is of infinitely more importance, an opportunity of fairly meeting and rebutting the calumny.

No species of slander can be more cruel and malicious in its origin, none more pernicious in its consequences: yet, unless some specific damage can be proved, or the charge be committed to writing, the suffering party, whose peace of mind is destroyed, and prospects ruined, has no appeal but to courts, whose powers, limited as they are, to the infliction of penance for the spiritual *benefit of the wrong-doer*, can administer no substantial relief or protection to the *party wronged*.

Yet it is this very jurisdiction of the ecclesiastical courts, which has frequently been assigned as a reason (though surely an inadequate one) why the temporal courts should not interfere to give a remedy in damages.

*It has been said that were the courts of law in such [**197*] cases to entertain an action, it would be productive of hardship to the defendant, who would be twice punished for the same

was recognized in *Root v. King*, 7 Cowen 617. In the three other cases above mentioned, there is no allusion in the opinions pronounced, to the doctrine of privileged communications. Thus stand the cases upon this question.

(*u*) 4 Co. 11. vide *infra*.

(*x*) 1 Roll. 36. 1. 15. 1 Com. Dig. tit. Defam. D. 30.

offence, by an award of damages in the temporal, and by the infliction of penance in the spiritual court.

This mode of reasoning is evidently fallacious : if a man contrive by one and the same act, to offend against religion, and to do a serious temporal injury to his neighbour, though the act be one and the same, it unites and comprehends offences wholly distinct, and it is absurd to say that the spiritual offence shall protect the offender from consequences merely temporal, and that, by rendering himself liable to a trifling penance, he shall rid himself of a load of temporal responsibility.

The objection, too, falsely assumes, that the payment of damages is in the nature of punishment ; by the law of England, the amount of damages is in all cases to be measured by the temporal prejudice sustained by the plaintiff, and they are awarded without any regard to the penal correction of the defendant, or the reformation of his manners ; the reason, at all events, is a strange one to have weighed in a court of law, whose records abound with cases, which prove that for the same act a person may be both civilly and criminally responsible.

[*198] *Such, however, is the law upon this point though formerly much doubt was entertained upon it.

In *Ann Davis's* case, (y), the plaintiff declared that she was a virgin of good fame, &c. and that one Anthony Elcock, citizen of London, of the substance of £2000, desired her for his wife, and had thereon conferred with John Davis her father, and was ready to conclude it, when the defendant, knowing the premises, but intending to injure the said Ann, and to obstruct the said Anthony's proceedings, published of the said Ann these words, " I know Davis's daughter well, she dwelt in Cheapside, and there was a grocer there that did get her with child ;" by which the said Anthony refused to take her to wife.

After verdict for the plaintiff, it was moved in arrest of judgment, that the words were not actionable, because the defamation was spiritual. But it was resolved by the whole court, that the action was maintainable :

1. Because, if a woman had a bastard, she was punishable by the statute of 18 Eliz. c. 3.

2. That if the defendant had charged barely with incontinence, the action would have been maintainable, since the ground of action *was temporal, namely, that she was defeated [*199] of her marriage.

But in subsequent cases, (z) the first of the reasons given in *Ann Davis's* case was denied to be law; and it was said, that the sole reason on which the judgment rested was the loss of marriage.

In *Baldwin and his wife v. Flower* (a), it was held that an action lay for calling the wife "whore," because, by such means, she might lose the communication and society of her neighbors.

In *Medhurst v. Balsam* (b), the plaintiff declared she had several suitors to marry her; and that the defendant said of her, "She is with child, and hath taken physic for it;" by which she became in disgrace, and lost the society of her neighbors. And it was adjudged that the action lay, though no loss of marriage was alleged.

This doctrine has, however, been overruled in a variety of cases (c).

In *Ogden v. Turner* (d), Holt, C. J. observed, "To say of a young woman that she *had a bastard, is a [*200] very great scandal, and for which, if I could, I would encourage an action; but it is not actionable, because it is a spiritual defamation, punishable in the spiritual court."

In *Byron v. Emes* (e), a young unmarried woman had been charged with gross incontinency. After a verdict for the plaintiff, it was moved, in arrest of judgment, that the words were not actionable, because they were of spiritual cognizance, and that no temporal loss had accrued: that to say, "a woman has a bastard," was never actionable before the statute for the provision of bastard children; and that, since the statute, it had never been held action-

(z) 1 Lev. 261. Sid. 397. Vent. 4.

(a) 3 Mod. 120.

(b) 1 Vin. Ab. 393. pl. 7. Sid. 397.

(c) 1 Lev. 261. 2 Keb. 451. 1 Sid. 396. Ld. Ray 1004.

(d) Holt. R. 40.

(e) 12 Mod. 106. 3 Will. 3.

able but where the party had been brought within the penalty of the statute, which is only where the bastard becomes chargeable to the parish ; that these words were most scandalous of a young woman ; and that, had it been *res nova*, perhaps an action would have lain, but that there were many authorities to the contrary. That it was a crime of which the spiritual court had cognisance, and could censure ; and that it was not reasonable that the party should be liable to ecclesiastical censure and an action too, on which account *Ann Davis's* case had been often shaken, and judgment was given for the defendant.

*For similar words in *Creaves v. Blanchet* (f), judgment, after verdict for the plaintiff, was arrested ; the court observing, that they could not overthrow so many authorities, and that the reason was, that fornication was a spiritual offence, and that no action lay at Common Law for what the Common Law took no notice of.

In the above case (g) also, the court said, that if it were *res nova*, it were reasonable to make the words actionable, for no greater misfortune can befall a young woman, whose well doing depends upon her having a good husband, than to be reputed a whore ; but the authorities are too many and great to run counter to them ; the reason of them is, that fornication is a spiritual offence, not punishable at Common Law, and an action shall not lie for charging one with an offence of which the law takes no notice, without special damages ; and if *Ann Davis's* case had been pursued, as it had been contradicted, it would do.

From these and many similar authorities, it appears, that the judges have long ago felt themselves overpowered with the number of the decisions upon this point, constantly regretting that they were no longer at liberty to determine differently.

*Before this subject is dismissed, it may be proper to [*202] remark, that in the old decisions upon this point, the only question contemplated seems to have been, whether

(f) Salk. 695. 6 Mod. 148.

(g) 6 Mod. 148.

the words of incontinency (*h*) were actionable, as imputing *a crime*; and it does not appear to have been much considered, whether they were not actionable on the *broad plain ground* that they immediately tend to hinder the plaintiff's advancement in life by an advantageous marriage.

It may, perhaps, be too late to contend, that the plaintiff is entitled to recover upon this general principle; the courts, however, have manifested a desire to administer every relief in their power to plaintiffs of this description, so that the most trifling loss sustained in consequence of such slander, as of a dinner, or other hospitable but gratuitous entertainment (*i*), will entitle the party to her action [1].

And, in general, wherever a person is prevented by the slander from receiving that which would otherwise have been conferred upon him, though gratuitously, the special damage will support an action. As where, in consequence of a charge of incontinence, a dissenting preacher *was prevented from preaching (*k*) [*203] and receiving voluntary donations.

So, the loss of particular customers by a tradesman is an actionable special damage (*l*).

(*h*) See the first resolution in *Ann Davis's case*, 4 Coke, 16.

(*i*) *Moore v. Meagher in Error*, 1 Taun. 39.

(*k*) *Hartley v. Herring*, 8 T. R. 130.

(*l*) *Barron v. Gibson, Ltd.* Ray. 831. Str. 566. Bull. N. P. 7. 1. Lev. 140.

[1] The refusal of civil treatment at a public inn has been held sufficient proof of special damage, *Olmsted v. Miller*, 1 Wendell 506: Loss of health and consequent incapacity to attend to business, was held on demurrer a sufficient averment of special damage, *Bradt v. Towsly*, 13 Wendell 253: Proof that the plaintiff was turned away from the house of her uncle, and charged not to return there until she had cleared up her character, was held sufficient to sustain an action, *Williams v. Hill*, 19 Wendell 305. So an allegation that individuals who had been in the habit of providing fuel, clothing, and provisions for the plaintiff, refused to do so any longer in consequence of the speaking of the slanderous words complained of, was held sufficient evidence of special damage, *Beach v. Ranney* 2 Hill, 309. In the last case, the three former cases are reviewed; and it is said they all proceed upon the assumption that the plaintiff had sustained *pecuniary loss* in consequence of the slanderous words, and that without such assumption the decisions could not be sustained.

And it is immaterial in such case, whether the words relate to his business or otherwise (*m*).

A mere apprehension of ill consequences cannot constitute a special damage ; so that it has been held to be insufficient for the plaintiff to allege, that in consequence of the words, discord happened between him and his wife (*n*), and he was *in danger* of a divorce.

Or, to allege that the plaintiff (*o*) was exposed to her parents' displeasure, and *in danger* of being put out of their house.

Or, to say he lost the affection of his mother (*p*), who intended him £100.

2. *How must the special damage be connected with the slander, to constitute a ground of action?*

[*204] It was said by Holt, C. J. that " At Common *Law, if a man do an unlawful act, he shall be answerable for the consequences, especially where the act is done with the intent that consequential damage shall follow (*q*)."

But it is not essential that the damage should be the necessary and inevitable consequence of the slanderous words ; it is sufficient, for instance, if they impose upon the plaintiff a violent and urgent motive for incurring expense.

In the case of *Peake v. Oldham* (*r*), Lord Mansfield expressed an opinion, that the expenses of an inquest incurred by a plaintiff, who had been wrongfully accused of murder, might be considered as special damage.

The rule appears to be, that *the damage must be the mere, natural, and immediate consequence of the wrongful act.*

The defendant asserted, that the plaintiff had cut his master's cordage (*s*) upon which the master discharged him, though he was under an engagement to employ him for a term. It was held by the court, that the discharge was not a ground of action ; that the

(*m*) 1 Lev. 140.

(*o*) *Barnes v. Bruddell*, 1 Lev. 261.

(*p*) Car. 1. 1 Com. Dig. tit. Defam. D. 30.

(*q*) Ld. Ray. 480.

(*s*) *Vicars v. Wilcocks*, 8 East. 1.

(*n*) 1 Roll. 34.

(*r*) Cowp. 277.

special damage must be the natural and legal consequence of the words spoken ; and that the defendant was no more answerable for the discharge, than if, in consequence *of [*205] the words, other persons had assaulted and thrown the plaintiff into an horse-pond.

The damage must be attributable *wholly* to the words ; so that, where the reason of a person's refusing to employ the plaintiff was founded, *partly* on the defendant's words, and *partly* on the circumstance of his having been previously discharged by another master, it was held that no action was maintainable (*t*).

And it has been said that (*u*), where, in consequence of the words, a third person has refused to perform a contract previously made with the plaintiff, and which he was in law bound to perform, no action is maintainable ; for the plaintiff, in such case, is entitled to a compensation for the non-performance of the contract ; and, were he allowed to maintain his action for the slander, he would receive a double compensation for the same injury : first, against the author of the slander ; and secondly, against the person who had refused to perform his agreement.

This doctrine would, in many instances, be productive of hardship to the plaintiff : he may resort, it is true, to his legal remedy against the person refusing to perform his contract ; but this can scarcely be considered as a full and *real [*206] compensation to the party, who, by the defendant's wrongful act, has had a benefit in possession wrested from him, and converted into a bare legal right (*x*).

(*t*) 8 East. 1.

(*u*) 2 Bos. & Pull. 284. 8 East. 1.

(*x*) Besides this, he may have been put to great trouble, and to some expense, in respect of which he could not obtain any compensation, in an action for the breach of contract. It is notorious, that no plaintiff, in such an action, recovers the whole of his costs. If it be said, that he does, in legal consideration, recover his full costs, it may be replied, that in such actions it is by no means essential that the special damage, which is necessary to support the action, should amount to strict legal damage. The loss even of a gratuitous donation, if it has been intercepted by means of the defendant's slander, is sufficient to support the action ; and in *Peake v. Oldham*, Cowp. 277, Lord Mansfield held, that the expenses of an inquest, which had been incurred by the plaintiff

[*207] *The defendant (*y*) having libelled a performer at a place of public entertainment, she refused to sing, and the proprietor brought his action on the ground of special damage, alleging that his oratorios had, in consequence of her absence, been more thinly attended. But it was held, by the learned judge who presided at the trial, that the injury was too remote ; that if the performer was really injured, an action lay at her suit ; and that it did not appear but that her refusal to perform arose from caprice or indolence.

[*208] *The plaintiff having once recovered damages in an action for words, cannot afterwards recover an ulterior compensation for any loss subsequently resulting from the same

in consequence of a slanderous imputation of murder, was special damage ; yet there the plaintiff was under no legal obligation whatsoever to incur such expenses. If one man, by a wrongful and malicious act, is the immediate cause of another man's committing another wrongful act, to the injury of the same party, there seems to be no objection, on the score of legal policy or morality, to his recovering a satisfaction from each, proportioned to the extent of the damage occasioned by each : he does not, either in point of law or fact, recover a double remedy for the same injury. The damage immediately occasioned by the slander, that is, the loss of character and the loss of the immediate benefit of his contract, and the trouble and extra expense to which he must be put to obtain compensation for the breach of contract, is distinguishable from the damage arising from the breach of contract.

If the objection were well founded, it would extend to the exclusion of an action to be brought by any servant who was under contract to serve, though the words were in themselves actionable ; for if an actual dismissal from service would not be an actionable damage by reason of the contract, there could be no sufficient *presumption of damage* to support the action. It would be absurd to sustain an action upon a mere presumption of evil consequences, and to deny it where the very consequences had resulted. It is also observable, that the objection is consistent with all the cases, many of which have occurred where the special damage has consisted of loss of marriage, where the party who, by reason of the slander, broke off the marriage, was under a promise to marry. Qu. ; therefore vide *Morris v. Langdale*, 2 B. & P. 234. See also the case of *Newman v. Zachary*, Ayleyn, 3, it was held, that case would lie for falsely representing to the bailiff of a manor, that a sheep of the plaintiff's was an estray, in consequence of which it was wrongfully seized. And see *Ld. Holt's observations*, *ib*.

(*y*) 1 Esp. R. 48.

words (*z*). Where the plaintiff (*a*), knowing the defendant's sentiments, procures the publication of that from which damage results, he will not afterwards be at liberty to ascribe his loss to the defendant's act, but be considered as the voluntary author of the mischief which follows [1].

(*z*) Bull. N. P. 7.

(*a*) 3 B. & P. 592. 5 Esp. R. 15.

[1] In addition to the cases cited under note (*a*) see *Weatherston v. Hawkins*, 1 T. R. 110, per Buller J. *Howard v. Thompson*, 21 Wendell 319; *Bradley v. Heath*, 12 Pickering 163; *Wilmarth v. Mountford*, 4 Wash. C. C. R. 79; *Larned v. Buffinton*, 3 Mass. R. 553. In *Warr v. Jolly*, 6 Carr. & Payne 497, the defendant in answer to the questions put by the plaintiff, (a clergyman,) told him that he had been cautioned against him as a man of intemperate habits, it was held that for words thus spoken by the defendant, an action would not lie. *Alderson, B.* in summing up told the jury, "the words are privileged by the occasion, unless you are satisfied that they were not spoken *bonâ fide*, and that the defendant was actuated by *malice*; and it lies on the plaintiff to show that the defendant was actuated by malicious motives."

CHAPTER VIII.

PUBLICATION AND INTENTION.

[*209] *HAVING thus considered the nature, quality, and consequences of the matter communicated, the next question, according to the elementary division already announced, is as to the act of communication by the defendant, and the *intention* with which he (a) made it.

It is of course, essential to the production of any loss or damage to the plaintiff, that the slanderous matter should have been communicated or published to some third person; in this respect, civil differs from criminal liability, which as will be seen, may be consummated by a publication to the party defamed without more; but, with the exception of the case of libel, the means of publication are indifferent, and do not affect the right of action.

[*210] *In the case of libel, it is sufficient if the defendant be the partial instrument of communication, either by assisting in its original construction or subsequent promulgation; if one party were to dictate, a second to write, and a third to distribute written or printed slander, the plaintiff would be left without remedy, unless each of these parties were to be considered as responsible for the whole effect produced.

The subject of publication will hereafter be discussed as a matter of evidence; assuming therefore, for the present, that some publica-

(a) *Supra*, p. 5.

tion (b) has been made to a third person, with the defendant's knowledge, and through his procurement; the next point for consideration is—

The *intention* with which he published.

The intention of the publisher may be regarded either independently of the occasion of publishing and the collateral circumstances, or in connection with them.

First, independently of the occasion and circumstances.

It seems to be clear, as well upon legal principles as on those of morality and policy, that where the wilful act of publishing defamatory matter derives *no excuse or qualification from collateral circumstances, none can arise from a consideration that the author of the mischief was not actuated by any deliberate and malicious intention to injure, beyond that which is necessarily to be inferred from the very act itself. For if a man wilfully does an act likely to occasion mischief to another, and to subject him to disgrace, obloquy, and temporal damage, he must, in point of law as well as morals, be presumed to have contemplated and intended the evil consequences which were likely to ensue. [*211]

To run the risk of effecting a serious injury to another, even from want of due care and attention, is necessarily an offence against the first principles of morality; and even were it otherwise, it would be highly impolitic and inconvenient, as a rule of law, to permit every man to destroy the characters of others, provided he was not actuated by motives of express malice, but acted without consideration, heedless of consequences.

Every legal analogy which can be called in aid suggests the same conclusion. According to the general and ordinary rules of Law, a remedy is given for every injury, that is, in respect of every wilful privation of right, and throughout the whole of the wide range of decisions on the subject of injury to a man's person or property, there is, perhaps, not *one to be found where [*212] the liability to make compensation is not necessarily and immediately consequent upon a wilful privation of a recognized legal

(b) See *Baldwin v. Elphinstone*, Bl. Rep. 1037. *Phillips v. Jarwen*, 2 Esp. 624. *Edward's and Watton's case*, 4 Lev. 240. Hob. 62.

right, in the absence of a legal justification or excuse, arising from collateral circumstances. Thus, in every instance where a forcible injury is committed against the person or property of another, the actual intention of the author of the mischief is immaterial; it is sufficient that he did the act either wilfully, or even negligently and carelessly: no defence, in such cases, can be founded on the absence of an actual intention to effect the particular mischief, and none can be made in the absence of collateral circumstances, which furnish some legal justification or excuse. In all such cases, it is the policy of the law, to make the party who is in fault make compensation to the extent of the injury, which he has occasioned to one who was blameless; and the law not only considers him to be in fault, who wilfully does an act likely to occasion mischief, but also every one who produces such consequences by culpable carelessness and inattention, and want of due regard to the interests of others. Such principles apply themselves to the particular case of slander too forcibly to require any laboured application. When the law has once defined the right to character and reputation, it follows, as a [*213] legal consequence, *that any one who wilfully deprives another of the enjoyment of that right, offends against the law, and is bound to make reparation in damages coextensive with the injury.

If such observations be well founded, it is clear that, if malice be used as descriptive of this species of injury, it must be understood not generally of actual malice, in the ordinary and popular sense of the term, or, as it has sometimes been called, *malice in fact*, but of malice in its legal and technical sense, as merely denoting that which is to be inferred from the doing of a wrongful act, without lawful justification or excuse (c).

That such *malice in law* is, in the absence of any legal justification or excuse, arising from collateral circumstances, sufficient to support the action for slander, seems now to be settled by the current of authorities.

Thus, in the case of the *King v. Lord Abingdon* (d), Lord Kenyon observed, that “In order to constitute a libel, the mind must

(c) See Starkie on Evidence, title Malice—Intention.

(d) 1 Esp. C. 228.

be in fault, and show a malicious intention to defame; for if published inadvertently, it would not be a libel: but where a libellous publication is unexplained by any evidence, the jury should judge from the overt act; and where the publication contains a *charge, slanderous in its nature, they should from thence [*214] infer that the publication was malicious."

In the case of the *King v. Phillips (e)*, Lord Ellenborough, observed, that "In case of libels, where the publication is proved, the law will infer malice." In another case (*f*), the same learned judge observed, that "Every unauthorized publication, which is detrimental to another, is in point of law, to be considered as malicious."

In the case of the *King v. Creevy (g)*, Le Blanc, J. said, that "Where a publication is defamatory, the law infers malice, unless any thing can be drawn from the circumstances of the publication to rebut the inference." [a a]

In the case of the *King v. Almon (h)*, the defendant, a bookseller, was convicted of publishing a libel, on proof of the sale of the book containing the libel, by a servant of the defendant, in his shop. And it was said, by the court, that this was *prima facie* evidence sufficient to ground a verdict upon; that if the defendant had had a sufficient excuse, he might have shown and proved it, and that any circumstances of exculpation or extenuation ought to have been established by the defendant.

(e) 6 East 470.

(f) *Brown v. Croome*, Starkie's C. 297.

(g) 2 M. & S. 273.

(h) *R. v. Almon*, 5 Burr. 2686.

[a a] See *Haire v. Wilson*, 9 B. & C. 472, where the court of K. B. held, that where the tendency of the libel was injurious to the plaintiff, it ought not to be left as a question for the jury, whether the defendant intended to injure the plaintiff [1]

[1] The doctrine advanced in *Haire v. Wilson*, is not as it would seem from the above note, that the question of libel or no libel is to be withdrawn from the jury, where the court are satisfied that the publication is libellous. That case only determines that the jury are not to pass upon the intention of the author or publisher, independent of, and distinct from, the publication, but that they must determine upon the tendency of the publication, and find their verdict accordingly. That it is the province of the jury, and not of the court, to pass upon the question of libel or no libel, is clearly settled by the case of *Baylis v. Lawrence*, 11 Adolph. & Ellis 920, in which the case of *Haire v. Wilson*, is reviewed. See also note [1], page 358. vol. i. *infra*.

[*215] *Abbot, L. C. J. in the case of the *King v. Harvey* (i) stated to the jury, that “ The man who publishes slanderous matter, calculated to defame another, must be presumed to have intended to do that which his publication is calculated to bring about, unless he can show to the contrary, and it is for him to show the contrary.”

A wanton disregard of the feelings of others, is, in point of law as well as morals, inexcusable ; so that it is no defence for the publisher of a libel, to say that he was but in jest, for, as has been observed by a learned writer, the mischief to the party grieved is no way lessened by the merriment of him who makes so light of it (k). The mere absence of malice in particular against the party whose reputation is destroyed, and the excuse that the real motive was not malice, but a desire of gain, is no better plea than that which might be used by a hired assassin (l).

[*216] If, however, the inference of malice be a mere *inference of law, it is capable of being rebutted ; but not, it should seem, otherwise than by proof of such an occasion of publishing, as furnishes a legal excuse for the act.

In the abstract, to deprive another, of his reputation, by any wilful or negligent act, is immoral and illegal ; but the law, for wise purposes, and upon a principle of policy and convenience, restrains the right to damages, and affords a privilege and protection to many communications, though they deeply affect the characters of individuals : but as such a protection depends on considerations of legal policy, it is for the law to prescribe its limits and boundaries.

And the law does not, as it seems, extend that protection to any case, merely because an actual intention to injure is wanting, and unless some recognized justification or excuse be supplied by the occasion and circumstances attending the publication.

(i) 2 B. and C. 258.

(k) 9 Co. 59. Moor, 627. Haw. c. 73. s. 14.

(l) Haw. P. C. c. 73. s. 14. It is scarcely necessary to observe here, that these observations do not apply where words, in themselves offensive, are used in jest, but without intention to convey any injurious imputation, and where the hearers do not understand the words in that sense ; such cases fall under a very different consideration, for there is not, in effect, any publication of slanderous matter.

From some of the older authorities, indeed, it appears to be doubtful whether, if the speaker or writer acted without malice, in the common and popular sense of the word, and intending, (it may be,) good, rather than harm, to another, he was civilly responsible for his act.

In the case of *Brook v. Sir Henry Montague* (m), *Coke cited a case, where a clergyman, in a sermon, re- [*217] cited a case out of Fox's Martyrology, that one Greenwood being a perjured person and a great persecutor, had great plagues inflicted on him, and was killed by the hand of God; whereas in truth, he never was so plagued, and was himself present at that sermon. And he thereupon brought his action upon the case, for calling him a perjured person; and the defendant pleaded not guilty; and this matter being disclosed upon the evidence, Wray, C. J. delivered to the jury, that it being delivered as a story, and not with any *malice* or *intention* to slander any, he was not guilty of the words maliciously, and so was found not guilty (n).

And Popham affirmed it to be good law, when he delivers matter after his *occasion* as a matter of story, and not with intent to slander any.

This case, it is to be observed, is no authority for concluding that the mere absence of a slanderous intention may furnish a legal defence, independently of a lawful occasion of publishing; for there was in that case, as will be hereafter seen, a lawful *occasion* which, in the absence of actual malice, supplied a sufficient justification. For the story was delivered by a clergyman, in the course of discharging the duties of his sacred office.

*The plaintiff brought an action against one for saying [*218] of him, that he heard he was hanged for stealing of an horse; and, upon the evidence, it appeared that the words were spoken in grief and sorrow for the news. Twisden, J. cited this, as a case which he heard tried before Hobart, J. who nonsuited the plaintiff, because the words were not spoken maliciously, and all the court agreed that this was done according to law (o).

It does not appear, from the short statement of this case, what

(m) He cited 14 H. 7. 14. 20 H. 6. 84.

(n) Cro. J. 90.

(o) Lev. 82. Mich. 14 Car. 2. 1 Vin. Ab. 540.

were the particular circumstances of the case; yet it seems, in principle, that if any one, trusting to an idle rumour, occasions damage to another, either in law or in fact, he is, on the principles of natural justice, liable to render amends.

He is at least guilty of negligence, in giving publicity to an injurious and unfounded calumny.

The law, in the ample provision which it makes for the convenience and exigencies of society, necessarily regards the occasion and circumstances of publication, and does not afford indemnity from the consequences of publication of injurious and noxious matter,

except with a view to some useful and beneficial purpose,
[*219] where a party may be supposed to act honestly "and sincerely in the execution of some public or private duty.

The gratification of curiosity, by the circulation of unauthenticated rumors, can scarcely be regarded as a fit object of legal protection. If so, it follows that every one who ventures to propagate an unfounded calumny, to the injury of the character of another, does it at his peril, and that, unless he can show some lawful occasion for publishing, that is, some cause for publishing under the particular circumstances which the law recognizes as affording a sufficient excuse, the total absence of an actual intention to injure will not avail as a justification.

It were almost needless to observe that, in numerous cases, the law gives an injured party a compensation in damages against the author of the mischief, although the latter was actuated by no mischievous intention. Thus, if a party, in the exercise of his lawful calling or business, casually injure the property or possession of another, he is liable to make compensation in damages, although he had no intention to injure any one.

So it is no justification or excuse to a man, that he published a libel, to the injury of another, merely in the course of his business and occupation of a printer, for he, as well as others, is
[*220] *bound so to carry on his trade or business as not to injure others (*p*).

The late case of *Prosser v. Bromage* (q) affords an illustration of these principles ; and by this decision, the application of the distinction between malice in law and actual malice, or malice in fact, and the sufficiency of malice in law to support the action, seem to be fully established.

The plaintiffs were bankers, and the charge was, that, in answer to a question put by one Lewis Watkins, whether he, the defendant, had said that the plaintiffs' bank had stopped, the defendant's answer was, it was true he had been told so, that it was so reported at C., and that no one would take their bills, and that he had come to town in consequence himself. It was proved that C. D. had told the defendant, that there was a run on the plaintiffs' bank at M. Upon this evidence, it was left to the jury to say whether the defendant had acted maliciously and with ill-will towards the plaintiffs, and that they ought to find their verdict for the defendant, if they thought that he had not acted maliciously. After a verdict for the defendant, upon a motion for a new trial, the court (of King's Bench) held that the law recognized the distinction between *these two descriptions of malice, viz : malice in fact and [*221] malice in law. That malice, in common acceptation, meant ill-will against a person ; but in its *legal* sense, it meant a wrongful act done intentionally, without legal justification or excuse ; and that, in ordinary actions for slander, malice in fact was not essential ; that malice in law was sufficient, and was to be inferred from the publishing of the slanderous matter, the act being wrongful and intentional, and without any just cause or excuse (r).

(q) 4 B. & C. 247.

(r) Bayley, J. delivered the judgment of the court, and after stating the circumstances of the case, observed : " The learned judge considered the words as proved, and he does not appear to have treated it as a case of privileged communication ; but as the defendant did not appear to be actuated by any ill-will against the plaintiffs, he told the jury, that if they thought the words were not spoken *maliciously*, though they might unfortunately have produced injury to the plaintiffs, the defendant ought to have their verdict ; but if they thought them spoken maliciously, they should find for the plaintiff ; and the jury having found for the defendant, the question, upon a motion for a new trial, was upon the propriety of this direction. If in an ordinary case of slander, (not a case of

[*222] *So if the author of a libel, though he never intended to publish it, were so negligent to keep it, that

privileged communication,) want of malice is a *question of fact* for the consideration of a jury, the direction was right; but if in such a case, *the law implies* such malice as is necessary to maintain the action, it is the duty of the judge to withdraw the question of malice from the consideration of the jury; and it appears to us that the direction in this case was wrong. That malice, in some sense, is the gist of the action, and that, therefore, the manner and occasion of speaking the words is admissible in evidence, to show they were not spoken with malice, is said to have been agreed, (either by all the judges, or at least by the four, who thought the truth might been given in evidence on the general issue,) in *Smith v. Richardson**, and it is laid down, 1 Com. Dig. action upon the case for defamation, G. 5, that the declaration must show a malicious intent in the defendant; and there are some other very useful elementary books, in which it is said that malice is the gist of the action, but in what sense the word malice, or malicious intent, are here to be understood, whether in the popular sense or in the sense the law puts upon those expressions, none of these authorities state. Malice, in common acceptation, means ill-will to a person; but in its legal sense, it means a wrongful act done intentionally, without just cause or excuse. If I maim cattle without knowing whose they are, if I poison a fishery without knowing the owner, I do it of malice, because it is a wrongful act, and done intentionally. If I am arraigned of felony, and wilfully stand mute, I am said to do it of malice, because it is intentional and without just cause or excuse: and if I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury, whether I meant to produce an injury or not; and if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces? And I apprehend the law recognizes the distinction between these two descriptions of malice, malice in fact and malice in law, in actions of slander. In an ordinary action for words, it is sufficient to charge that the defendant spoke them *falsely*; it is not necessary to state that they were spoken *maliciously*. This is so laid down in *Styles* 392, and was adjudged in error in *Mercer v. Sparks*. *Owen* 51. *Noy* 35. The objection there was, that the words were not charged to have been spoken maliciously; but the court answered, that the words were themselves malicious and slanderous, and therefore the judgment was affirmed. But in actions for such slander as is, *prima facie*, excusable, on account of the cause of speaking or writing it, as in the case of servants' characters, confidential advice, or communications to persons who ask it or have a right to expect it, malice in fact must be proved by the plaintiff; and in *Edmondson v. Stevenson*, B. N. P. 8, Lord Mansfield takes the distinction between these and ordinary actions of slander. In *Weatherstone v. Hawkins*, 1 T. R.

* *Wills*, 24.

through mere inadvertence, the *contents became public, to [*223] the detriment of another's reputation, he would, no doubt,

110, where a master, who had given a servant a character, which prevented his being hired, gave his brother-in law, who applied to him upon the subject, a detail, by letter, of certain instances, in which the servant had defrauded him. Wood, who argued for the plaintiff, insisted that this case did not differ from the case of common libels ; that it had the two essential ingredients, slander and falsehood ; that it was not necessary to prove express malice ; if the matter is slanderous, malice is implied ; it is sufficient to prove publication ; the motives of the party publishing are never gone into ; and that the same doctrine held in actions for words, no express malice need be proved. Lord Mansfield said the general rules are laid down as Mr. Wood has stated ; but to every libel there may be an implied justification from the occasion. So as to the words, instead of the plaintiff's showing it to be false and malicious, it appears to be incidental to the application by the intended master for the character, and Buller, J. said this is an exception to the general rule, on account of the occasion of writing. In actions of this kind, the plaintiff must prove the words "*malicious*" as well as *false*. Buller, J. repeats in *Pasley v. Freeman*, 3 T. R. 51, that for words spoken confidentially upon advice asked, no action lies, unless express malice can be proved [1]. So in *Hargrave v. Le Breton*, 4 Burr. 2425. Lord Mansfield states that no action can be maintained against a master for the character he gives a servant, unless there are extraordinary circumstances of express malice. But in an ordinary action for a libel or for words, though evidence of malice may be given to increase the damages, it never is considered as essential ; nor is there any instance of a verdict for the defendant on the ground of want of malice. Numberless occasions must have occurred, (particularly where a defendant only repeated what he had heard before, but without naming the author,) upon which, if that were a tenable ground, verdicts would have been sought for and obtained, and the absence of any such instance is a proof of what has been the general and universal opinion upon the point. Had it been noticed to the jury how the defendant came to speak the words, and had it been left to them, as a previous question, whether the defendant understood Watkins as asking for information for his own guidance, and that the defendant spoke what he did to Watkins merely by way of honest advice, to regulate his conduct, the question of malice in fact would have been proper as a *second* question to the jury, if their minds were in favour of the defendant upon the first ; but as the previous question I have mentioned was never put to the jury, but this was treated as an ordinary case of slander, we are of opinion that the question of malice

[1] In *Van Spike v. Cleyson*, Cro. Eliz. 541, it was held not to be actionable for one man to tell another *confidentially*, not to trust a merchant for (it was said) it is only by way of counsel.

- [*224] be considered amenable in damages. He had no right *to place the character of another in jeopardy without lawful excuse, and, in law as well as morals, is responsible for the
- [*225] injury which his culpable *negligence has occasioned. The legal principle on which such responsibility is founded, is clearly delivered in Buller's Law of Nisi Prius.

Every man ought to take care that he does not injure his neighbour; and, therefore, whenever a man receives a hurt

[* 226] through the *default* of *another, though the same were not wilful, yet if it be occasioned by *negligence or folly*, the law gives him an action to recover damages for the injury so sustained (q).

This principle comprehends not only the instance just mentioned, where a writing not intended to be published, is nevertheless, divulged

ought not to have been left to the jury. It was, however, pressed upon us with considerable force, that we ought not to grant a new trial, on the ground that the evidence did not support any of the counts in the declaration; but upon carefully attending to the declaration and the evidence, we think we are not warranted in saying, that there was no evidence to go to the jury to support the declaration, and had the learned judge intimated an opinion that there was no such evidence, the plaintiff might have attempted to supply the defect. We, therefore, think that we cannot properly refuse a new trial, upon the ground that the result upon the trial might have been doubtful. In granting a new trial, however, the court does not mean to say, that it may not be proper to put the question of malice as a question of fact for the consideration of the jury; for if the jury should think, that when Watkins asked his question, the defendant understood it as asked in order to obtain information to regulate his own conduct, it will range under the class of privileged communications, and the question of malice, in fact, will then be a necessary part of the jury's inquiry: but it does not appear that it was left to the jury, in this case, to consider whether this was understood, by the defendant, as an application to him for advice, and if not, the question of malice was improperly left to their consideration. We are, therefore, of opinion, that the rule for a new trial must be absolute.

In the case of *Duncan v. Thwaites*, 3 B. & C. 585. Abbot, L. C. J. observed, " I take it to be a general rule, that an act, unlawful in itself and injurious to another, is considered, both in law and reason, to be done *maliciously* toward the person injured, and this is all that is meant in a declaration of this sort, which is introduced rather to exclude the supposition that the publication had been made on some innocent occasion, than for any other purposes.

(q) B. N. P. 95.

for want of care, but every case in which a noxious publication results from mere levity or thoughtless jocularity ; for though the actual intention to produce mischief might not at the moment actually influence the mind of the defendant, yet he was guilty of a wilful invasion of the natural and absolute right of another man,—an act for which, in point of natural justice, he is responsible, and from which, malice, in its legal sense, is necessarily to be inferred.

The plea of minority affords no defence to an action *for slander or libel, though a precedent is to be found of [*227] a plea that the defendant was an infant, within the age of seventeen (*r*), the validity of such a plea was denied by Lawrence, J. in the case of *Woolnoth v. Meadows* (*s*). And Lord Kenyon expressly stated, that if an infant utter slander, he is responsible for it in a court of justice (*t*).

But though actual malice be not essential to civil liability, and though it be sufficient that the defendant has acted wilfully, or even negligently and carelessly, without a due regard to the character and reputation of another, yet still the mere act of communicating that which is slanderous, will not subject a party even to civil liability, without some degree of culpability on his part. If, for instance, a servant or agent were, in the ordinary course of his duty, to deliver a sealed libel, without any knowledge of its contents, though he were thus the actual instrument of publication, yet if he acted but as the agent of another, without any reason for suspecting that any wrong was intended, he would not subject *himself to any civil, still less to any criminal, [*228] responsibility.

This application of a plain and general principle of natural justice, is too obvious to require further observation in this place.

(*r*) Com. Dig. Pleader, 2 L. 2.

(*s*) 5 East. 471.

(*t*) 8 T. R. 337. See also Bac. Ab. tit. Infancy. Starkie on evidence, tit. Infant.

CHAPTER IX.

JUSTIFICATION—TRUTH.

[*229] *HAVING thus observed upon the question of intention, as considered independently of the occasion of publishing and of all collateral circumstances, the subject is next to be considered in reference to the occasion and circumstances of the act.

These may either constitute an absolute and peremptory defence to the action, independently of the question of intention, or they may supply a qualified or conditional justification, dependent on the actual intention, of the party.

The former class, where the defence is wholly independent of the question of actual intention, is subject also to a distinction, dependent on the existence or nonexistence of a probable cause for the act.

In the first place, the defendant is justified in law, and exempt from all civil responsibility, if that which he publishes [*230] be true (*a*). For, as has *already been observed, no one, in point of natural justice and equity, can have any title to a false character; he can show no legal interest in the suppression of the truth, or in the continuance of error; it would be inconsistent with every sound legal principle and analogy, to allow him to recover damages for an injury to that which he either does not, or at least ought not to possess; and it would be contrary to

(*a*) It may, perhaps, be doubted, (as has already been suggested, *supra*, p. 7,) whether it might not be more correct to consider the *falsity* of the slander as of the essence of the wrong, than to treat the truth as a collateral ground of defence; and some reasons, principally technical, have been assigned for adopting the latter course. *Supra*, p. 5, in the note.

the plainest and most obvious principles of public policy and convenience, to permit a man to make gain of the loss of that reputation and character in society, which he had justly forfeited by his misconduct (*b*).

Sir William Blackstone (*c*), in his Commentaries, *seems to consider the defendant's exemption, in this in- [*231] stance, as extended to him in consideration of his merit, in having warned the public against the evil practices of a delinquent. He says, that it is *damnum absque injuria*, intimating that the act of the defendant does not constitute a *wrong* in its legal sense; and then proceeds to observe, that this is agreeable to the reasoning of the civil law, "*Eum qui nocentem infamavit non est æquum et bonum ob eam rem condemnari, peccata enim nocentium cognita esse et oportere et expedire.*" Notwithstanding this, there seems to be some difficulty in supporting this justification, on the ground that the defendant's act is not, in contemplation of law, a *wrong*, since, as will be seen, it is considered as such in the criminal proceeding, and if the act be justifiable, because it confers a public benefit, it must be so to all legal purposes; for it would savour too much of paradox to say, that in respect of an individual claiming a private compensation, the act is innocent, because it is beneficial to the public, but that, in relation to the public so benefited, the same act is wrongful. It may, therefore, be more consistent to consider the *plaintiff as having ex- [*232]

(*b*) See Preliminary Discourse. By showing the truth of the slanderous matter, you do not show that it was not maliciously spoken or published, but merely that the party is not entitled to damages, because he is guilty of the charge imputed. Per Holroyd, J. in the case of *Fairman v. Ives*, 5 B. & A. 646.

On similar grounds of public policy, it has been held, that a man cannot recover damages for any defamation which affects him merely in respect of some illegal trade or occupation. Thus, it seems, that an action cannot be maintained for an alleged libel against the plaintiff, in his vocation as an exhibitor of sparring matches. *Hunt v. Bell*, 1 Bing. 1.

(*c*) 8 Bl. Com. 125. But although the doctrine of the civil law, in respect of such actions, is by no means free from obscurity, the defence seems clearly to have been limited to those instances where the public was benefited by a publication of the truth. See Preliminary Discourse, xxxvii.

cluded himself from the protection of the law by his own misconduct, than to attribute the exemption to any merit appertaining to his adversary.

When a plaintiff is really guilty of the offence imputed he does not offer himself to the court as a blameless party seeking a remedy for a malicious mischief; his original misbehaviour taints the whole transaction with which it is connected, and precludes him from recovering that compensation to which an innocent person would be entitled (c).

That the truth was a good justification, does not appear to have been doubted in the case of words spoken; in respect of an action for libel, indeed, the contrary has been maintained, but the authorities upon this point, though not numerous, fully establish the validity of such a justification.

In the case of the *King v. Roberts* (d), Lord Hardwicke, C. J. is said to have thus expressed himself on a motion for an information against the defendant: "It is said, that if an action were brought, the fact, if true, might be justified; but I think that is a mistake, such a thing was never thought of in the case [*233] of *Harman v. Delany* (e). I never heard such a justification in an action for a libel even hinted at, the law is too careful in discountenancing such practices; all the favour that I know truth affords in such a case is, that it may be shewn in mitigation of damages; and of the fine in an indictment or information" [1].

(c) See Preliminary Discourse, xxxi.

(d) B. R. M. T. 8. G. 2. MSS. 3 Bac. Ab. 453. Dig. Law. Lib. 16. Sel. Ni. Pri. 1st Edit. 929.

(e) Str. 898.

[1] Lord Hardwicke in Michaelmas term, 8 Geo. II. A. D. 1735, spoke of the truth being given in evidence *in mitigation of damages*, and in *Underwood v. Parks*, 2 Strange, 1200, Mich. T. 17. Geo. II, it is said the defendant offered to prove the words to be true *in mitigation of damages*; and it is still often said that the truth cannot be given in evidence under the general issue either in bar or in mitigation of damages. In the time of Lord Hardwicke, it was denied not only by him, but by others, that the truth could be given in evidence *in bar of a recovery*, and there was therefore no inaccuracy in speaking of giv-

And in another case, it was said by Lee, C. J. (*f*) (upon the trial of the defendant upon an information), that it had always been holden that the truth of a libel could not be given in evidence by way of justification; because, where the person charged with any crime is guilty, he ought to be proceeded against in a legal course, and not reflected upon in such a manner. In the *King v. Bickerton* (*g*), the Chief Justice (*h*) observed, (upon a motion for a criminal information), that though truth be no justification for a libel, as it is for defamatory words, yet it would be sufficient cause to prevent the extraordinary interposition of the court.

In the last two cases, the dicta of the learned Judges cannot be but understood as spoken with reference to the criminal proceeding before them, and therefore as no authorities in respect of an action. —On the other hand, Hobart, C. J. in the case of *Lake v. Hatton* (*i*), said, that a libel, though *the con- [*234] tents be true, may be justified in an action upon the case.

And Holt, C. J. laid it down expressly, that “A man (*k*) may justify in an action for words or for a *libel*; otherwise in an indictment.”

In the case of *J'Anson v. Stuart* (*l*), the truth was pleaded in bar of the action for written slander, and no objection was made, or exception taken, either by the court or the plaintiff's counsel, to the defendant's right to avail himself of a defence of that nature.

Sir William Blackstone seems to have been of opinion, that the truth was a good justification in case of an action for libel; since, after asserting that it is a good defence in case of slander spoken (*m*), he adds, “What was said with regard to words spoken,

ing the truth in evidence *in mitigation*, for it was then admissible for that purpose; but since it has been conceded on all hands, that the truth may be given in evidence in *justification* of the words spoken, it is inaccurate and calculated to produce a confusion of ideas, to speak of *giving the truth in evidence in mitigation of damages*; for if the truth of the words can be shewn, the defendant is entitled to claim not merely that the evidence be received in mitigation of damages, but that it shall operate as a *bar* to the recovery.

(*f*) Sel. Ni. Pri. 1st Ed. 929.

(*g*) Str. 498.

(*h*) Sir J. Pratt.

(*i*) Hob. Rep. 253.

(*k*) 11 Mod. 99.

(*l*) 1 T. R. 748.

(*m*) 3 Bl. Com. 125.

will also hold in every particular with regard to libels by printing or writing, and the civil action consequent thereupon (*n*).

With respect to an action for Scandalum Magnatum, it was resolved in the Earl of Northampton's case (*o*), that "the publishing of false rumors, either concerning the king or of the high [*235] *grandees of the realm was in some cases punishable by the Common Law ; but of this were divers opinions. Yet it was resolved in general, that touching the matter and quality of the words, that they ought to be *false* and horrible."

North, C. J. (*p*) was of opinion, that under the statute, the defendant could not justify in an action for scandalum magnatum. But both Atkins and Scroggs, justices, thought differently ; and the latter held, that the words in the principal case might have been justified by showing the special matter either in pleading or evidence.

And in Lord Cromwell's case (*q*), the defence in such an action seems to have been considered on the same footing with a common action for slander. The general rule, therefore, seems to be, that in an action for words, their truth is a good justification [1].

The plaintiff was charged as accessory to a felony, the principal having been acquitted : and it was held to be competent for the defendant to go into evidence to prove his guilt, because what had passed between others could not affect him (*r*).

(*n*) See also 3 Wood. 182 ; 3 Bl. Com. 125, 14th Ed. ; and Selwyn's Ni. Pri. 1st ed. 929.

(*o*) 12 Rep. 133.

(*p*) 2 Mod. 150.

(*q*) 4 Co. 13.

[1] Until 1792 when the judges of England gave their opinion in parliament upon questions put to them on the *Libel Bill*, the only authorities for the position that a defendant might plead *the truth of a libel in justification* were the *dicta* of HOBART, C. J. in *Lake v. Hatton*, Hob. R. 253, and of HOLT, C. J. in an anonymous case, 11 Mod. 99, and the acquiescence of the bar and the court in *J' Anson v. Stewart*, 1 T. R. 748. See *Holt's Law of Libel*, p. 280. Since then, however, are the cases of *King v. Parsons*, in which Lord KENYON, before whom the cause was tried in 1799, observed that it was competent for a defendant in an action for a libel, to *plead the truth* of the supposed libel in justification ; and of *Plunket v. Cobbett*, tried before Lord ELLENBOROUGH in 1804, in which that learned judge observed in his remarks to the jury, "in case the *libel had been true* it would have been open to the defendant to have justified it on the record."

(*r*) *Cook v. Field*, 3 Esp. C. 133.

Where (s) the words imputed a charge of murder, for which the plaintiff had been tried and acquitted *it was [*236] held that the defendant might justify specially, and that the truth of such plea might be tried. And it has been said that where the defendant justifies specially, by pleading the truth of a capital offence imputed to the plaintiff (t), on such issue being found against the plaintiff, he may be put upon his trial for the offence without intervention of a grand jury.

The justification must be pleaded, and proved with great precision. Thus if the defendant tax the plaintiff with having feloniously stolen a sum of money, it will be no justification that the plaintiff had in fact (u) stolen some other personal chattel [1].

So where the defendant (x) said of a counsellor at law, "You are a paltry lawyer, and use to play on both [*237] hands." The defendant justified as to the latter words, that the plaintiff had devised certain articles against F. R. concerning misdemeanors supposed to have been done by him, and afterwards promised F. R. that he should not be molested by reason of the said articles; and yet, notwithstanding, by the procurement of others, the plaintiff endeavored to prosecute F. R. upon

(s) *England v. Bourke*, 3 Esp. C. 80.

(t) 3 Esp. R. 133. *Cook v. Field*. Many remarkable cases have occurred, where the plaintiff's action for slander imputing the commission of a crime, has occasioned his prosecution for and conviction of the imputed offence. In the case of *Johason v. Browning*, 6 Mod. 217. *Ld. Holt*, C. J. cited a case (*Pigot's case*, Cro. Car. 383.) where a mother recovered damages against her son-in-law for having maliciously prosecuted her for the murder of his father. He, to requite her kindness, brought an appeal of murder, she was thereupon tried and convicted at the King's Bench Bar, and carried down and burnt in Berkshire.

And the Chief Justice mentioned the case of a plaintiff who brought his action, the defendant having called him a highwayman; upon the trial it appeared that he was one; he was taken in court, committed to Newgate and hanged.

And Darnell (adds the reporter) remembered the like fate, which befel a client of his.

(u) Cro. J. 676.

[1] See to the same effect *Andrews v. Van Duzer*, 11 Johns. R. 38; *Van Ness v. Hamilton*, 19 Id. 349.

(x) Cro. J. 267.

the articles, before the chancellor and commissioners of the Archbishop of Canterbury ; and the plea was held to be bad on demurrer.

No suspicion, however strong, will amount to a justification (*y*).

Neither is common fame any ground for justifying an extra judicial charge (*z*),

In *Cuddington v. Wilkins* (*a*), which was an action for publishing these words of the plaintiff, "He is a thief;" the defendant pleaded, that the plaintiff had been guilty of stealing six sheep. The plaintiff replied that after the felony, and before the publication of the words, he had been pardoned by a general [*238] pardon. Upon a demurrer, *this replication was holden to be good, inasmuch as the guilt, as well as the punishment, is taken away by a pardon. And it was held, that it makes no difference in such case, whether the pardon be general or special, of which the defendant might have been ignorant, for that every person who publishes slanderous words does it at his peril.

But it was said, that if he had been convicted and pardoned afterwards, it would be otherwise.

But (*b*) a pardon after a conviction of perjury will not restore the perjured person to his credit.

It has long been settled (*c*), that the truth, if relied upon as a justification, or even in mitigation of damages [1], must be pleaded. And as the degree of certainty and precision necessary to complete a justification of this nature is inseparably connected with the form and rules of pleading, further remarks upon this topic will be reserved for the division in which the technical mode of framing the plea is considered.

(*y*) *Powell v. Plunkett*, Cro. Car. 52.

(*z*) *Hutt*. 13. *Bridg.* 62. *Brownlow*, 2.

(*a*) *Hob.* 81.

(*b*) *Sid.* 92.

(*c*) *Str.* 1200.

[1] See note [1] p. 233, *supra*.

CHAPTER X.

OF PUBLICATIONS MADE IN THE COURSE OF PARLIAMENTARY OR JUDICIAL PROCEEDINGS.

*THE law, also, without regard to the question of intention, and on grounds of obvious policy (*a*), repels the claim to damages in respect of any publication duly made in the ordinary course of a parliamentary or judicial proceeding. [*239]

In the first place (*b*), it seems that no member of either house is in any shape responsible in a court of justice for any thing said in that house, however offensive the matter may be to the feelings, or detrimental to the interest of any individual (*c*) ; for policy requires that those who are by the constitution appointed to provide for the safety and welfare of the public, should, in the execution of their high functions, be wholly uninfluenced *by [*240] private considerations. Accordingly, in such cases, (as has been asserted by a high authority (*d*), courts of law possess no jurisdiction. But the privilege does not extend beyond the walls of the house to which the member belongs ; and a peer, who publishes

(*a*) See Preliminary Discourse.

(*b*) 1 Esp. R. 226.

(*c*) By 4 Hen. c. 8. members of parliament are protected from all charges against them for any thing said in either house. And this is further declared in the Bill of Rights. 1 W. & M. st. 2. c. 2. See 1 Bl. C. 164 [1].

(*d*) Lord Kenyon, in the King *v.* Lord Abingdon. 1 Esp. Rep. 226.

[1] By the CONSTITUTION of the United States, Art. 1, § 7, it is ordained that for any speech or debate in either house, the senators and representatives in congress, shall not be questioned in any other place ; and a similar provision is to be found in the constitutions of most of the states of the Union in respect to the members of the state legislatures.

(e) libellous matter in the public prints, as having constituted part of his speech in parliament, is as open to an action or prosecution as any private individual [1].

The same rule, as to impunity, suggested and governed by similar principles, applies, to judges, jurors, and witnesses, in respect of any thing published by them in the course of a judicial proceeding.

Certain charges (f) having been preferred by the plaintiff against an officer of his own regiment, the court martial, after acquittal, subjoined the following declaration:

“The court cannot pass, without observation, the malicious and groundless accusations that have been produced by Captain J. against an officer whose character has during a long period of service, been so irreproachable as Colonel Stewart’s; and the [*241] court do unanimously declare, that the *conduct of Captain J. in endeavouring falsely to calumniate the character of his commanding officer, is most highly injurious to the good of the service.” For this the plaintiff brought his action against Sir J. Moore, the president of the court martial. Upon the trial of the cause before Sir J. Mansfield, C. J. it appeared, that the supposed libel formed part of the opinion of the court, delivered by the defendant to the Judge Advocate, for the purpose of being submitted to the king, and immediately followed the opinion of the court martial;—“that he, the aforesaid Colonel Richard Stewart, is not guilty of either of the charges, and the court do most fully and honorably acquit him.”

The plaintiff was nonsuited.

And afterwards a new trial was refused, on the ground that the words complained of formed part of the judgment of acquittal. [2]

So it is held, that no presentment (g) by a grand jury can be a

(e) *R. v. Lord Abingdon*, 1 Esp. R. 226. *R. v. Creevy*, 1 M. & S. 273.

(f) 2 N. R. 341.

(g) *Bac. Ab. tit. Libel. 455. Mo. 627. Haw. P. C. c. 73. s. 8. See also* the observations of the court in *Johnson v. Sutton*, 1 T. R. 493.

[1] See *Coffin v. Coffin*, 4 Mass. R. 1.

[2] In another case of an action for an alleged libel, contained in a report of a military court of inquiry appointed to investigate charges against the plaintiff: It was held, that the report was a privileged communication, and could not

libel, not only because persons who are supposed to be returned without their own seeking, and are sworn to act impartially, shall be presumed to have proper evidence for what they do ; but also, because it would be of the utmost ill consequence in any way to discourage *them from making their inquiries [*242] with that freedom and readiness which the public good requires.

Several of the authorities in the books cited relate to cases of criminal prosecution, but the reasons and principles are equally forcible, when applied to a civil action, the same policy in both cases opposes itself to the calling in question the motives of the parties.

Witnesses, like jurors, appear in court (*h*) in obedience to the authority of the law, and therefore may be considered, as well as jurors, to be acting in the discharge of a public duty ; and though convenience requires that they should be liable to a prosecution for perjury committed in the course of their evidence, or for conspiracy in case of a combination of two or more to give false evidence, they are not responsible in a civil action for any reflections thrown out in delivering their testimony.

The plaintiff brought an action (*i*) against one L., and the defendant being produced as a witness at the trial, gave evidence that the plaintiff was a common liar, and so recorded in the Star Chamber ; by reason whereof the jury gave the plaintiff small damages. After verdict for the *plaintiff for this alleged slander, it was moved in arrest of judgment, that the action did not lie ; for if it did, every witness might be charged upon such a suggestion, and judgment was given for the defendant (*k*).

properly be received in evidence. *Home v. Bentinck*, 4 Moore 563 ; 8 Price 226 S. C. See note to the report of this case in 8 Price, p. 244.

(*h*) See 2 Inst. 228. 2 Roll. Rep. 198. Pal. 144. 1 Vin. A. 387. Cro. Eliz. 230.

(*i*) *Harding v. Bulman*. Brownlow 2. Hutt. 11.

(*k*) It has been doubted, (not much to the credit of the law), whether a pre-concerted scheme for taking away the life of another by false evidence, for the sake of obtaining a statutory reward upon conviction, amounts, when carried into effect, to the crime of murder.—See Leach's C. C. L. 52. Foster 130, 131.

With respect to petitioners in parliament (*l*), and suitors or prosecutors in courts of law, it has been held, that no proceeding, according to the regular course of justice, will make the complaint amount to a libel, so as to render the party criminally liable, on the ground that it would be a great discouragement to suitors to subject them to public prosecutions in respect of their applications to a court of justice; and that the chief intention of the law, in prohibiting persons to revenge themselves by libels or any other private manner, is, to restrain them from endeavoring to make themselves their own judges, and to oblige them to refer the decision of their grievances to those whom the law has appointed to determine them (*m*).

[*244] *And the same reasons oppose themselves to allowing an *action* to be maintained, grounded upon such a proceeding.

In the case of *Lake v. King* (*n*), the plaintiff declared that he was a doctor of laws, and vicar-general to the Bishop of Lincoln; and then set forth the libel complained of, which charged him with extortion, vexation, oppression, and other misdemeanors in his office.

The defendant pleaded that part of the matter was true, and that therefore he procured the petition (which was the libel complained of) to be engrossed, and delivered to the committee appointed by the commons to hear and examine grievances; and that afterwards, for the better manifestation of the grievances contained in the said petition, he caused the same to be printed, and delivered to the members of the committee. The plaintiff demurred. It was agreed on all hands, that the exhibiting the petition to the committee of parliament was lawful, and that no action lay for it, although the matter contained in the petition was *false and scandalous*, because it was in the summary course of justice, and before those who had power to examine whether it was true or false.

(*l*) See the resolution of the House of Commons in the case *Kemp v. Gee*, 9 Feb. 8. W. 3. See post p. 245.

(*m*) *Dyer*, 285. 2 *Ins.* 228. 2 *Buls.* 269. *Godb.* 340. *Pal.* 145. 188. *Vent.* 23. *Haw. Pl. C. c.* 73. s. 8. 3 *Bac. Ab.* 499. 3 *Lev.* 169. 4. *Rep.* 14.

(*n*) 1 *Saun.* 131.

*It appears that this case (*o*) was much considered, [*245] and that judgment was given for the defendant, after it had depended twelve terms, by Hale, C. J. and Twisden and Rainsford, Justices, on the ground that it was the order and course of proceeding in parliament to print and deliver copies of petitions, of which the court would take notice.

But it was held that to have distributed the printed copies to any but members of parliament would have been actionable.

And that, in general, where the printing was not warranted by the necessity of so great a number of copies, to print them would be actionable (*p*) ; but that, in the principal case, the printing them (which is a publishing of them to the printers and compositors,) was not so great a publication as to have so many copies transcribed by several clerks.

It appears to have been urged in favour of the plaintiff, that the complaint was made to a court which had not power to redress it. But in the case of *Kemp v. Gee* (*q*), it was resolved by the House of Commons, that Gee was guilty of a breach of privilege in suing Kemp and others *for a libel, supposed to [*246] be contained in a petition presented to the house for a redress of grievances, and that all petitions to them were lawful, or at least punishable by themselves only [1].

(*o*) Lev. 241. 1 Mod. 58. Sid. 414.

(*p*) Sid. 414.

(*q*) 9 Feb. 8 W. 3. See C. J. Holt's argument in the case of *Ashby v. White*. Dig. L. L. 18. 1 Salk. 19. 3 Salk. 17 Holt. Rep. 524.

[1] There is no case in the American Reports of an action for a libel supposed to be contained in a petition to congress or to the legislature of either of the states ; but there are numerous cases of actions for libels alleged to exist in petitions, memorials and remonstrances presented to the appointing power of the state, or to officers possessing the power of appointment to or removal from office. The principle held in those cases, is that such communications are *prima facie* to be considered *privileged*, i. e. the individuals presenting them are, upon principles of public policy, to be presumed to act *innocently*, until it be shown by the party complaining of having been slandered, that they were actuated by *express malice*. In accordance with this principle were decided the cases of *Blanchard v. Thorn*, 5 Johns. R. 508 ; *Vanderzee v. McGregor*, 12 Wendell 545 ; *Howard v. Thompson*, 21 Id. 319 ; *O'Donaghue v. McGovern*, 23 Id. 26. See also 2 Serg. & Rawle, 23 ; 4 Id. 420 ; 3 Pick. 379 ; 1 Tyler 164 2

So no action lies for any allegation, pleading, or other matter (*r*) published in the usual course of a civil or criminal proceeding in courts of justice. The reason for which is, that (*s*) if actions should be permitted in such cases, those who have just cause of complaint would not dare to complain, for fear of infinite vexation. And, as was observed by Lord Mansfield, C. J. (*t*) there can be no scandal if the allegation be material; and if it be not, the court before whom the indignity is committed, by immaterial scandal, may order satisfaction, and expunge it out of the record, if it be upon the record.

Thus where (*u*) the plaintiff declared that the de-
[*247] fendant, *in a certain affidavit before the court, had sworn that the plaintiff in a former affidavit had sworn falsely; the court held that this was not actionable, for that in every dispute in a court of justice, where one, by affidavit, charges a thing which the other denies, the charges must be contradictory, and there must be affirmation of falsehood; and this being necessary in a legal proceeding, no action would lie for it.

So in trespass (*x*), if the defendant, in his plea of justification, falsely aver that the plaintiff was a bankrupt, and that the defendant had a commission upon the statute, by virtue of which those

Id. 129; and the late English cases, *Woodward v. Lander*, 6 Carr. & Payne 548, and *Blake v. Pilford*, 1 Moody & Robinson 198; and it seems that no action will lie though the petition be presented in a quarter not authorized to grant its prayer, if in presenting it the parties act in *good faith*, *Fairman v. Ives*, 5 Barn. & Ald. 647.

(*r*) 1 Roll. 33.

(*s*) 4 Coke, 14.

(*t*) 2 Burr. 817.

(*u*) *Astley v. Young*, 2 Burr. 817. So where in an action on the case by A. against B., the plaintiff declared that he took his oath in B. R. against B. of certain matters, to bind him to his good behaviour; and thereupon B said falsely and maliciously, and intending to scandalize the plaintiff, "There is not a word true in that affidavit, and I will prove it by forty witnesses." On motion in arrest of judgment, the jury having by their verdict found the words to be false and malicious, it was holden by the court, that the action was not maintainable, because "the answer which B. made to the affidavit was a justification in law, and spoken in defence of himself, and in a legal and judicial way."—Roll. Ab. 87. pl. 4. Sir W. Jones, 431. Mar. 20. pl. 45. Cited by Mr. J. Holroyd in *Hodgson v. Scarlett*, 1 B. and A. 244.

(*x*) Cro. J. 432.

goods were delivered to him ; yet the plaintiff, for the words cannot maintain an action.

In *Weston v. Dobniet* (*y*), the plaintiff declared, that there was a suit in the spiritual court, between one A. and the defendant, wherein A. produced the now plaintiff as a witness ; that the defendant, having a day given to except against the witnesses, put in his exceptions in writing, alleging, that the now plaintiff was not a competent witness, and *that there ought [*248] not any credit to be given unto him, because he was perjured. Whereupon the plaintiff (pending the suit) brought the action for this scandal ; but the whole court held that the action was not maintainable, because the proceeding was in the common course of justice, and not *ex malitiâ*.

And in criminal prosecutions, it seems to be perfectly well established, that no action will lie for any distinct matter disclosed in the course of such a proceeding, but that the party must seek his remedy for a malicious and groundless prosecution, either by writ of conspiracy or by a special action on the case, founded upon the whole of the circumstances (*z*).

Sir Richard Buckley (*a*) brought an action against Owen Wood, for exhibiting a bill against him in the Star Chamber, and charging him with several matters examinable in that court ; and charging him further, that he was a maintainer of pirates and murderers, and a procurer of pirates and murderers, which offences were not determinable in the Star Chamber.

And it was resolved by the whole court, that for any matter that was contained in the bill that was examinable in said court, no action lies, *although the matter be merely [*249] false, because it was in the course of justice ; and that this agreed with the judgment before given in *Cutler v. Dixon*, (*b*) : But it was also resolved, that for the words not examinable in the Star Chamber, an action on the case lies, for that cannot be in a

(*y*) 3 Bl. Com. 126. 10 Mod. 210. 219. 300. Str. 691.

(*z*) 3 Bl. Com. 126. 10 Mod. 210. 219. 300. Str. 691.

(*a*) 4 Co. 14.

(*b*) Dyer, 285.

course of justice [1] ; and that if such a matter might be inserted in bills in so high a court to the great slander of the parties, and they cannot answer it to clear themselves, nor have their action as well to clear themselves, as to recover damages for the great injury and wrong done them, great inconvenience would ensue.

That by law, no murder or piracy could be tried by bill, but by indictment only ; and therefore, that the defendant had not only mistaken the proper court, but the manner and nature of the bill had not any appearance of a suit in the ordinary course of justice.

But that if a man brought an appeal of murder returnable in the common pleas, no action would lie ; for, though the writ was not returnable before competent judges, yet it is in the nature of a lawful suit, namely, by writ of appeal."

The first part (*c*) of this resolution has been frequently confirmed, and extends to all proceedings in the regular course of justice, and to actions for scandalum magnatum (*d*).

The defendant (*e*) brought a writ of forger of false deeds against Lord Beauchamp : and, pending the writ, Lord B. brought an action for the scandal. The defendant justified by his having the said writ before. Upon demurrer, the justification was holden to be good, and out of the intendment of the law and statutes of slander.

And if the publication be made in the course of a judicial proceeding, it does not appear to be essential to the justification that the defendant strictly observed the technical mode of proceeding.

The plaintiff declared, that he made an affidavit to have the defendant bound over to his good behaviour : and that the defendant, in the hearing of the justices and officers (*f*) of the court and others present, said, "There is not a word of truth in that affidavit, and I will prove it by forty witnesses." And it was held that the words were justifiable, being in a judicial way [2].

(*c*) 2 Inst. 228. Roll. Ab. 87. pl. 4. Sir W. Jon. 431.

(*d*) 2 . Buls. 269. 2 Burr. 808. 3 Bac. Ab. 492.

(*e*) Lord Beauchamp *v.* Sir R. Croft, Dyer 285.

(*f*) Jo. 341. Mar. 20. Boulton *v.* Clapham.

[1] See post, p. 252.

[2] See comments of Chancellor WALWORTH on the case of Boulton *v.* Clapham, in Hastings *v.* Lusk, 22 Wendell 419. See also Kean *v.* McLaughlin, 2 Serg. & Rawle 470.

And the same rule obtains where application is made in the usual course to a magistrate or other peace officer.

The defendant went to a justice (*g*) of the peace *for [*251] a warrant against the plaintiff, for stealing his ropes.

The justice said, "Be advised, and look what you do:" and the defendant replied, "I will charge him with flat felony, for stealing my ropes from my shop."

The court agreed, that these words being spoken to a justice of the peace, when he came for his warrant, which was lawful, would not maintain an action, for if they could, no other would come to a justice of the peace to inform him of a felony [1]. But where the question arose, whether the clerk to a magistrate could be called on as a witness, to state whether he had not, by the defendant's orders, written an extra-judicial affidavit (which was charged in the declaration to be a libel), and delivered it to the magistrate, Wood, B. ruled that the question tended to criminate the witness, though he acted merely as a clerk (*h*).

(*g*) Hutt. 113. *Ram v. Lamley*.

(*h*) *Maloney v. Bartley*, 3 Camp. 210. The learned Baron observed, "I think the questions proposed tend to criminate the witness. The affidavit which he is supposed to have copied and delivered to the magistrates is alleged by the plaintiff to be libellous, and it was extra-judicial; therefore, all concerned in writing and publishing it are in point of law guilty of a misdemeanor. Had the affidavit been made in the course of a judicial proceeding, no indictment nor action could have been maintained against the clerk, whatever might have been the nature of its contents. But the affidavit being voluntary and extra-judicial, I cannot take notice that the person, before whom it is pretended to be sworn, was a magistrate, or allow any privilege to those who were employed in framing it. The witness is in the common situation of a person who has, without authority written a copy of a libel and delivered it to a third person. If his master, or if the magistrate, had ordered him to do so, this would have been no justification. It has been held, that the mere delivery of a libel to a third person, by one conscious of its contents, amounts to a publication, and is an indictable offence. I take the question to be, whether the witness was not concerned in writing the affidavit, and delivering it to the magistrate, and this I am of opinion he is not bound to answer. So in the case of *M'Gregor v. Thwaites*, 3 B. & C. 24. it was held to be no answer to the action, that the matter published by the defendants was a correct report of what actually took place in the presence of a magistrate, inasmuch as it appeared that he was not then called on to act, either in a judicial or magisterial capacity.

[1] An action of slander does not lie for a charge of a criminal offence made

[*252] *By the latter resolution, in the case of *Buckley v. Wood(i)*, the court decided that scandalous matter *would be actionable*, if exhibited by means of an improper process, *and* in a court which had no jurisdiction over the subject matter; but it plainly appears that the court held, that both impropriety of process and want of jurisdiction must concur to deprive the defendant of his justification; for it was expressly said, that the bringing a writ of appeal of murder in the Common Pleas would not be actionable; since, though they wanted jurisdiction in the particular instance, yet that the proceeding by writ of appeal was in the nature of a lawful suit.

[*253] *In *Lake v. King(k)*, the court said, that notwithstanding what was reported in Buckley's case, it was held that want of jurisdiction will not make a libel, for it is only the error of counsel.

Powell, J. (*l*) is reported to have said, "I have heard my Lord Hale say, that for putting matters in a bill, of which the court hath no cognizance, action does not lie against the plaintiff," though in the fourth report it is laid down otherwise.

Serjeant Hawkins (*m*), in his Pleas of the Crown, observes, "It has been holden by some, that no want of jurisdiction of the court, to which such a complaint is exhibited, will make it a libel, because the mistake of the court is not imputable to the party, but to his counsel. Yet, if it shall manifestly appear, from the whole circumstances of the case, that a prosecution is entirely false, malicious, and groundless, and commenced not with a design to go through with it but to expose the defendant's character under a shew of legal proceeding, I cannot see any reason why such a mockery of public justice should not rather aggravate the offence than make it cease to be one, and make such scandal a good ground of indictment at the suit of the king, as it makes the malice of the proceeding

[*254] *a good foundation of an action on the case, at the suit of the party, whether the court had jurisdiction or not."

to a magistrate on which a warrant issues, although the accused be discharged after examination, *Schock v. McChesney*, 2 P. A. Browne's R. 6, App.

(*i*) 4 Co. 14. (*k*) 1 Vin. Ab. 389. note to pl. 67. (*l*) 2 Lut. 1571.

(*m*) Pl. Cr. 73 s. 8. See also Serj. William's note, 1 Saund. 132.

From these authorities it may be collected generally, that *an action of slander cannot be maintained for any thing said, or otherwise published, either by a judge, a party (n), or a witness, in the due course of a judicial proceeding, whether criminal or civil*, though for a malicious and groundless prosecution, an action, and perhaps an indictment, may be supported, founded on the whole proceeding (o).

It must, however, be recollected, that the justification does not extend to any publishing which the usual course of judicial proceeding does not warrant. Thus, in *Lake v. King*, the great doubt was not whether the exhibiting the petition to parliament was lawful or not, but whether the defendant was warranted in printing and publishing it in the manner alleged (p) in his plea.

And so, in the case of *Hare v. Meller (q)*, it was adjudged to be lawful to present a petition to the queen, though reflecting upon the character of the plaintiff; but deemed to be actionable afterwards *to divulge the contents to the disgrace of [*255] the person intended.

And though it be matter of public policy, that the causes for the exercise of authority in the dismissal of an officer should be made known, yet it seems that such a publication must be limited according to the nature of the official duty of the defendant.

Thus in the case of *Oliver v. Bentinck (u)*, although it was held that the defendant, being Governor in Council of Fort St. George, would be justified in publishing, according to the fact, that the Court of Directors had resolved to dismiss the plaintiff from the service for a gross violation of the trust reposed in him as commanding officer of the Molucca Islands, and that he, the defendant, had been ordered to erase his name from the army list, yet it was held, that it was essential to the defendant's plea to show on what account it was part of his duty to publish the alleged libel (x).

(n) As to the case of an advocate, vide *infra*.

(o) Vide *infra*.

(p) 1 Saund. 132.

(q) 3 Lev. 169. See also 4 Rep. 14. See also *R. v. Creevy*, 1. M. & S. 273, and the ensuing chapter.

(u) 3 Taunt. 456.

(x) And for want of shewing this, the plea was held to be defective, but leave was given to amend.

[*256] *Where, however, a party claims title to an estate, to the injury of the real owner, though he does it extra-judicially, yet is he not liable in an ordinary action for slander of title, but the plaintiff must recover, if at all, by means of a special action on the case, shewing that there was no colour or probable cause for the claim (y).

Mansfield, C. J. observed, that it was better for the company, for the country, and for the *plaintiff himself* (according to the report,) that the cause of his dismissal should be stated, than that it should be supposed that the East India Company did it *suo arbitrio*.

Heath, J. observed, that it was the constant practice here, that when a delinquent has been brought to a court-martial, the commander in chief has directed the sentence to be read at the head of every regiment.

Lawrence, J. said, "I suppose the plaintiff's object was to lay before a jury the circumstances of this gentleman's conduct, by a question to be raised on this record; that could never be permitted in this form; but the plea is certainly defective, for the order is issued to the governor in council; and it is not shown that what the defendant did, he did as governor in council; he only pleads that he did it as governor, and does not show how it became his duty to do this in his individual capacity as governor.

Chambre, J. "The only doubt I have is, that the plea does not state on what account it became an act in the execution of the defendant's duty to publish this. Can we suppose that he had a right to publish it in hand-bills and newspapers? The only authority he shows is for erasing the name from the army list, not for the publication.

(y) Sir G. Gerard v. Dickenson, 4 Co. 28. Goulding v. Herring, *infra*. 290.

CHAPTER XI.

PARLIAMENTARY AND JUDICIAL REPORTS.

*UPON the question, how far the reporting of parliamentary proceedings can be deemed libellous some difference of opinion has prevailed. [*257]

Upon an information against the defendant, for publishing (*a*) “*Dangerfield’s Narrative*,” he pleaded that he was, at the time of the publication, Speaker of the House of Commons, and, as such, had a right to publish the votes and acts of the house, and that the narrative was printed and published as parcel of the proceedings; and notwithstanding this, the court gave judgment for the king (*b*).

But in the *King v. Wright* (*c*), an application was made to the Court of King’s Bench to grant a criminal information against the defendant for printing and publishing a libel on an individual. Upon *the defendant’s affidavit, it appeared that [*258] the charge complained of was a paragraph contained in the report of the Committee of Secrecy of the House of Commons, a literal copy of which he had published.

After hearing counsel on the part of the applicant, the information was refused, Lord Kenyon, C. J. observing, “As this was a true copy of the report of the House of Commons, I think there was not the least pretence for the motion; the application supposes that the

(*a*) *R. v. Williams* 2 Show. R. 471. Comb. 18. See Sir R. Atkyns on the Power of Parliament.

(*b*) This case was reprobated by Lord Kenyon, C. J. and Grose, J. giving judgment in the *King v. Wright*, 8 T. R. 293.

(*c*) 8 T. R. 293.

publication is a libel, but it is impossible to admit that the proceeding of either of the houses of parliament is a libel.

“ The case of Sir W. Williams, which was principally relied on, happened in the worst of times, but that has no relation to the present case. There the publication was the paper of a private individual, and under pretence of the sanction of the House of Commons, an individual published ; but this is a proceeding by one branch of the legislature, and therefore we cannot inquire into it.”

Grose, J. said, “ On looking into the judicial proceedings of this court, I find no instance of such an information as the present ; the case of Sir W. Williams is most like this but it must be remembered, that that was declared by great authority to be a disgrace to the country.”

[*259] *Lawrence J. observed, “ It has been said, that the publication of the proceedings in the courts of justice, when reflecting on the character of an individual, is a libel ; to support which position, the case of *Waterfield v. the Bishop of Chichester* has been cited (*d*) ; but, on examining that case, it appears that the charge there was, that the plaintiff had not published a *true account*. The proceedings of courts of justice are daily published, some of which highly reflect on individuals, but I do not know that an information was ever granted against the publisher of them. Many of these proceedings contain no point of law, and are not published under the authority or the sanction of the courts, but they are printed for the public. Not many years ago, an action was brought in the Court of Common Pleas by Mr. Curry (*e*), against Walter, the proprietor of the Times, for publishing a libel in the paper of “ The Times ;” which supposed libel consisted in merely stating a speech made by a counsel in this court, on a motion for leave to file a criminal information against Mr. Curry. L. C. J. Eyre, who tried the cause, ruled that this was not a libel, nor the subject of an action, *it being a true account of what had passed in this court ; and in this opinion the Court of Common Pleas afterwards, on a motion for a new trial, all concurred,*

[*260] *though some of the judges doubted whether or not the defendant could avail himself of that defence on the*

(*d*) 2 Mod. 118.

(*e*) 1 B. & P. 525.

general issue: though the publication of such proceedings may be to the disadvantage of the individual, the having these proceedings made public more than counterbalances the inconveniences to the private persons, whose conduct may be the subject of such proceedings. The same reasons, also, apply to the proceedings in parliament; it is of advantage to the public and even to the legislature besides, that true accounts of their proceedings should be generally circulated, and they would be deprived of that advantage if no person could publish their proceedings without being punished as a libeller."

"Though, therefore, the defendant was not authorized by the House of Commons, to publish the report in question, yet as he only published a true copy of it, I am of opinion that the rule ought to be discharged."

This case calls for several observations. In the first place the only question before the court was, whether under the circumstances they would permit a criminal information to be filed, a matter which is usually regarded as discretionary. In the next place it is to be remarked that, although, the learned judges gave reasons for refusing the rule, which if well founded would go to the general extent of sanctioning all true reports of parliamentary and judicial proceedings; yet *that*, according *to several [*261] late decisions, the legal privilege of publishing such proceedings is subject to very considerable limitations. And, that the authority of this case to so great an extent has been much questioned (f).

Notwithstanding the analogy assumed to exist between the publication of parliamentary proceedings and of judicial reports, there seems to be a wide and manifest distinction between them. With respect to many parliamentary proceedings, so far is it from being *legally* essential to the interests of the public that they should be divulged, that a party who publishes them is in strictness guilty of a breach of privilege. Courts of justice, on the other hand, are

(f) See the observations of Lord Ellenborough, C. J. and Grose, J. in *Stiles v. Nokes*, 7 East 493. *R. v. Fisher*, 2 Camp. 563. *R. v. Fleet*, 1 B. & A. 379. *R. v. Carlile*, 3 B. & A. 167. *Lewis v. Clement*, 3 B. & A. 702. *Flint v. Pike*, 4 B. & C. 473.

open to all, the common law of the land, is to be learned principally by attention to the practice and proceedings of such courts, and therefore it is of essential importance to the public that such proceedings should, to a great extent at least, be communicated to all.

And the court in holding, that no parliamentary proceeding can be deemed libellous, seem to have regarded the subject [*262] too abstractedly, and without *reference to the time, occasion, and circumstances attending the publication.

The question whether a particular publication shall be deemed to be illegal or even criminal, may depend not merely on the matter published, but on the occasion and circumstances of the publishing. It frequently happens, that the publication of that which is injurious is not justifiable, although the original publication was privileged and sanctioned by the particular occasion and circumstances (*g*). Thus, in Lord Abingdon's case, it was held that a peer who publishes libellous matter in the public prints, as having constituted part of his speech in parliament, is as open to an action or prosecution as any private individual (*h*).

[*263] And in the case of the *King v. Greery* (*i*), it *was held, that a member of the House of Commons was liable to be convicted on an indictment for a libel, in publishing in a newspaper the report of a speech, delivered by him in the house, which contained libellous matter upon an individual.

On principles of public convenience the ordinary rule is, that no

(*g*) See *Lake v. King*, 1 Saund. 131. supra. There it was held that the printing a petition to the House of Commons, for the use of the members of that House, was justifiable, because that was according to the ordinary course of proceeding, but that any other publication not authorized by parliamentary practice would have been illegal. So in the case of *Flint v. Pike*, 4 B. & C. 473, it was held that it was not justifiable to publish the speech of a counsel reflecting on the character of an individual, although no action was maintainable against the counsel. (*h*) *R. v. Lord Abingdon*, 1 Esp. C. 226.

(*i*) 1 M. & S. 273. *Le Blanc*, J. at the trial, in summing up to the jury, informed them that they were to consider, whether the publication tended to defame the prosecutor; that he was of opinion, that it did, but left the question to them. He further stated that where the publication is defamatory, the law

action can be maintained in respect of fair and impartial reports of a judicial proceeding.

This rule is subject to several natural and necessary limitations first, as to the *subject matter* of the report, and secondly, as to the *manner* in which the proceeding is reported.

First as to the *subject matter*. As the privilege in [*264] such cases is founded upon grounds of public policy and convenience, it ceases where the nature of the investigation is such, that to publish it would obviously be offensive and injurious to the public, as where it involves blasphemous or indecent matter. Where the very object of the inquiry was to protect the interests of religion, morality, decency, and good order, by repressing impious, blasphemous and obscene or seditious publications, it would not only be impolitic but weak and absurd to allow the same matters to be afterwards published with impunity as parcel of the judicial proceeding.

In the case of *The King v. Carlile (k)*, a criminal information was granted against Mary Carlile, for a libel, entitled the mock trial of Mr. Carlile, but which contained a correct account of what had taken place upon that trial, in the course of which the whole of Paine's *Age of Reason* had been read. And the court held, that though, as a general position, it was certainly lawful to publish the proceedings of courts of justice, yet that it must be taken with this qualification, that what is contained in the publication must be

infers malice, unless any thing can be drawn from the circumstances attending the publication to rebut that inference, and left them to say whether the circumstances did rebut that inference; informing them that in point of law, the circumstances of its being a publication of a speech delivered by a member of the House of Commons, did not rebut it. The jury found the defendant guilty, and the Court of King's Bench afterwards held that the conviction was proper. Lord Ellenborough in reference to the observations of the court, in the case of *The King v. Wright*, said he should hesitate in pronouncing it to be a *proceeding* in parliament. He also observed that, when it became necessary to discuss the case of *Curry v. Walter*, he should say that the doctrine there laid down must be understood with very great limitations, and that he should never fully assent to the unqualified terms attributed in the report of that case to Eyre, C. J.

(k) 3 B. & A. 167.

neither defamatory of an individual, tending to excite disaffection, nor calculated to offend the morals of the people ; for if its contents were calculated to produce such effects, instead of disseminating *useful knowledge, it would produce great mischief (l).

The publication, also, of ex-parte proceedings in criminal cases is not only privileged by the law, but is regarded as a great misdemeanor. Where the evidence is ex-parte, the party charged has no means of establishing a defence, and such premature statements tend to excite undue prejudices against the accused, and to deprive him of the benefit of a fair and impartial trial ; and therefore, in several instances, the publication of matters of criminal charge, contained in depositions before magistrates, has been held to be indictable (m).

(l) See the observations of Best, J., *ibid.* Bayley, J. observed, that the case of *Curry v. Walter* must be taken with great qualifications.

(m) See the *King v. Fisher* and others, 2 Camp. 563. The printer, publisher, and editor of a public newspaper, were indicted for publishing a paragraph, purporting to contain the examinations before a magistrate, upon a charge brought against the prosecutor by Mrs. Popplewell ; the publication then proceeded to assume the truth of the depositions, and the guilt of the prosecutor, and to pronounce that he would meet with the reward due to his villainy.

It was contended, on the authority of several of the cases above cited, that the publication was justifiable, as being a true account of the proceedings in a court of justice.

But Lord Ellenborough, C. J. said, " Trials at law fairly reported, although they may occasionally prove injurious to individuals, have been held to be privileged. Let them continue so privileged ; the benefit they produce is great and permanent, and the evil that arises from them is rare and incidental ; but these preliminary examinations have no such privilege, their only tendency is to prejudge those whom the law still presumes to be innocent, and to poison the sources of justice. It is of infinite importance to us all, that whatever has a tendency to prevent a fair trial should be guarded against. Every one of us may be questioned in a court of law, and called upon to defend his life and his character ; we should then wish to meet a jury of our countrymen with unbiassed minds ; but for this there can be no security, if such publications are permitted."

In the case of the *King v. Flet*, 1 B. and A. 379, a criminal information was granted against the printer and publisher of a newspaper for publishing his minutes of the evidence taken before a coroner's inquest on a charge of murder, accompanied by comments on the facts as they occurred.

*And as the publishing such preliminary and ex-parte statements is an illegal act in respect of its tendency to obstruct the due course of public justice ; and as the same act makes a special prejudice to the particular individual, not by its tendency to deprive him of the benefit of a fair and impartial trial, but by the particular disparagement to his reputation and character in society, the publisher is, on the ordinary principle, subject to an action, at the suit of the injured individual (n). In the late case of *Duncan v. Thwaites* (o), it was expressly decided, that the defendant could not justify the publication of a charge imputing to the plaintiff indecent conduct to a female child, on the ground that the alleged libel was no more than a correct account of the proceeding which had taken place at a public police-office (p). [*266] [*267] [*268]

Bayley, J., adverting to the publication of the minutes, observed, "That is a matter of great criminality ; for the inquest before the coroner leads to a second inquiry, in which the conduct of the accused is to be considered by persons who ought to have formed no previous judgment of the case. It is a statement of evidence taken wholly ex-parte, and where there is no opportunity for cross-examination. A jury who are afterwards to sit upon the trial ought not to have ex-parte accounts previously laid before them. They ought to decide solely upon the evidence which they hear on the trial. It is therefore highly criminal to publish before such trial an account of what has passed on the inquest before the coroner.

Abbott, J. "Every person who has attended to the operations of his own mind, must have observed how difficult it is to overcome preconceived prejudices and opinions, and that more especially in matters of sentiment or passion. It is, therefore, most mischievous to the temperate administration of justice, that a person, either during or before a judicial examination, should publish a statement of facts which are made the subject of a subsequent trial ; and it is still more mischievous when that statement is accompanied with comments. It is impossible to say that much which exists in this case is not calculated to create a prejudice in the public mind."

(n) Thus, though a nuisance to a public highway be in itself a public offence, and indictable as such, and is not, in the absence of damage to a particular individual, the subject of an action, yet if by reason of such public offence any damage accrues to any individual in particular, he may maintain an action.

(o) 3 B. & C. 556.

(p) Abbot, L. C. J., in delivering the judgment of the court, upon this point said, "I take it to be a general rule, that a party who sustains a special and particular injury by an act which is unlawful on the ground of public injury,

And although the objections to the publication of ex-parte statements do not apply so forcibly to civil as they do to criminal proceedings, yet it seems that the publication of ex-parte proceedings, even of a civil nature, when they are injurious to the characters of individuals, cannot be justified. For the communication of such ex-parte proceedings, may frequently be attended with [*269] great hardship to the individual, and can seldom, *previous to the final decision, be of importance to the public as containing any judicial information (q).

In the case of *Duncan v. Thwaites*, although the Lord Chief Justice pointed out some distinctions between that case and the previous case of *Curry v. Walter*, the proceeding which had been published in the former, being one which was merely *preliminary* in its nature and which might be lawfully conducted in *private*, if the magistrates engaged in it thought fit, whilst the latter proceeding was before a court instituted for final determination as well as preliminary inquiry, and whose doors are open to all who can be accommodated, and the proceeding itself had been actually terminated by refusing the application, yet his lordship desired that notwithstanding those distinctions between the case then before the court, and that of *Curry v. Walter*, it was not to be inferred that the Bench was of opinion that the publication of ex-parte proceedings, even in that court, was a matter allowable by law.

may maintain an action for his own *special* injury ; and if publications like the present impede the due administration of justice towards persons accused of offences, it is impossible to say that the individual, whose trial may be affected by them, does not sustain a special and peculiar injury, even in that view ; and he certainly sustains an injury to his character of the same nature as the injury to any other person by any other species of defamation."

His Lordship further observed, in the course of pronouncing his judgment, "The publication in question impeaches the plaintiff's character ; a publication impeaching private character is actionable, unless the occasion of publishing makes the publication excusable ; and where the publication is a violation of the criminal jurisprudence of the country, and there is nothing to call for it, the publication is not exusable.

(q) In a late case, the Lord Chancellor (Eldon) observed, that he recollected the time when it would have been matter of surprise to every lawyer in Westminster Hall, to learn that the publication of ex-parte proceedings was legal.

Next as to the *manner* in which a judicial proceeding is reported. As the privilege of publishing judicial proceedings with impunity, notwithstanding *the inconvenience and mis- [*270] chief which such publications may occasion to individuals, is founded upon grounds of public policy and convenience; the condition necessarily annexed to immunity is, that the proceeding be fairly, impartially, and correctly reported.

It is, therefore, plain that this principle will not justify any misrepresentation of the facts; to mis-state any part of the proceeding would be not to benefit and instruct, but to mislead the public, and might create most intolerable mischief to individuals inasmuch as it would annex to the calumny a degree of authenticity from its supposed connection with a solemn deliberate judicial investigation. It is not, however necessary to resort to the latter consideration for the purpose of divesting such a publication of legal defence; it is sufficient that the misrepresentation deprives the defendant of the excuse which might have been available, had he reported the facts correctly.

In the case of *Stiles v. Nokes* (*r*), it was observed by Lord Ellenborough, C. J. and Grose, J. that it must not be taken for granted that the publication of every matter passes in a court of justice, however truly represented, is, under *all circumstances*, and with *whatever* *motive published, justifiable, [*271] but that doctrine must be taken with some grains of allowance. "It often happens," said Lord Ellenborough, "that circumstances, necessary for the sake of public justice to be disclosed by a witness in a judicial inquiry, are very distressing to the feelings of individuals on whom they reflect. The protection afforded by law to such publications does not, however, extend beyond a plain unvarnished statement of the proceeding, and will not warrant the least misrepresentation of facts, or even any high colouring of the circumstances stated."

Lofield (*s*) having recovered in an action against Bankcroft, for maliciously charging him with felony, and for procuring him to be

(*r*) 7 East. 493.

(*s*) Easter Term, 5 G. 2. 1732. 2 Barnard. K. B. 128. *The King v. Lofield*.

arrested on suspicion of the same, afterwards published that Bankcroft had *conspired* to charge him with this felony, and that, in vindication of his character, he had brought an action against him for so doing, and had recovered £1100 damages against him." On a motion for a criminal information, the court said, that the present advertisement had falsely represented the fact, for Lofield did not bring his action for a conspiracy, but for Bankcroft's [*272] maliciously charging him with felony, and "a conspiracy requires an infamous judgment. The rule was made absolute.

The same principle applies not only to misrepresentations of facts, but also to all partial and garbled statements, prejudicial to the character of the individual to whom they relate; such reports are, at the least, useless to the public, and to individuals oftentimes most injurious.

It is obvious, that, if it were allowable to pick out and select particular parts of a judicial proceeding, the privilege would be liable to the most grievous abuse, and that under the colour and pretence of communicating to the public, useful and necessary information, which is the legitimate ground for investing such publications with peculiar and extraordinary means of protection, the reputation of individuals would be subjected to most unjust and unmerited calumny. And, therefore, a reporter is not privileged in publishing a speech of a counsel containing reflections on the character of an individual annexed to a short summary of the trial without stating the evidence (*t*).

So it has been held that the publishing the speech of a [*273] counsel in a judicial proceeding, coupled *with a general assertion, that his statement was proved by a witness called upon that trial, cannot be justified (*u*).

The evidence ought to be stated in order that those who read the

(*t*) *Flint v. Pike*, 4 B. & C. 473. vide *infra* under the title *plea*. And quære whether he would be justified in publishing a *speech* reflecting on the character of an individual, even although the evidence were also published, *ibid*.

(*u*) *Lewis v. Walter*, 4 B. & A. 605.

report may judge for themselves, and it is not sufficient to substitute the mere inference of the reporter (*x*).

And though the report were to state the evidence, it seems to be doubtful whether the publication of the speech of a counsel which reflected on the reputation of another would be justifiable, unless, at least, it appeared that the observations were warranted and that the party deserved them (*y*) or that they were so connected with the case, that the detail was necessary for the information of the public (*z*) [*a a*].

And though a counsel might not be responsible in a common action for slander, although he made use of observations detrimental to individuals, yet it seems that a party who repeated the slanderous matter to all the world, would be liable to such an *action; for the repeating such slander, is not done in [*274] the course of the administration of justice, and therefore is not privileged (*a*). And, although the uttering of slanderous matter may be justified by the occasion on which it is spoken, the subsequent publication of it may be criminal.

In the case of *Duncan v. Thwaites*, (*b*), already cited, it was held that a statement, purporting to be an account of a charge made at a police office against the plaintiff for an attempt to violate the person of Ann Chandler, was not justified by a plea which set forth the depositions, from one of which it appeared that the report wholly

(*x*) Per Abbott, L. C. J. 4 B. & A. 612. "If a party is to be allowed to publish what passes in a court of justice, he must publish the whole case, and not merely state the conclusion which he himself draws from the evidence."

(*y*) See the observations of Holroyd, J. 4 B. & C. 477. *ibid* 482.

(*z*) See the quære of Bayley, J. 4 B. & C. 476.

[*a a*] In *Saunders v. Mills*, 6 Bingh. 213, it was held, that a statement in a newspaper of the speech of a counsel, in a cause reflecting on the character of the plaintiff, who was the defendant in that cause, without stating any evidence, could not be justified, though the defendant proved that he had copied the paragraph from another paper.

(*a*) See the observations of Holroyd, J. in the case of *Flint v. Pike*, 4 B. & C. 481. See also *Lake v. King*, 1 Saund. 120. *R. v. Creevy*, 1 M. & S. 273. *R. v. Lord Abingdon*, 1 Esp. C. 226.

(*b*) 3 B. & C. 226.

omitted the deposition of Desormeaux, a surgeon, in which he had deposed, that to a question proposed by him to Ann Chandler, to a material fact, she had repeatedly answered in the negative, although she had before the magistrate sworn in the affirmative.

Neither does the privilege extend to any defamatory observations or comments, made in addition to what passed in court. Thus, where the defendant had published a statement, which he attempted by his plea to justify, as being a *fair and impartial account of a proceeding in a court for the discharge of insolvents, but had prefaced that statement by the words “shameful conduct of an attorney,” it was held that a justification could not be supported (b).

(b) Abbott, L. C. J. in pronouncing the judgment of the court observed, the question whether a person may publish a correct narrative of proceedings, in a court of justice, which contains matter defamatory of a third person not a party to the suit, it is not necessary to decide, because the narrator in this case has not confined himself to what actually passed in court, but has prefaced the statement with the words “shameful conduct of an attorney,” he has therefore taken upon himself to make that allegation concerning the plaintiff; we think, therefore, the pleas are bad, &c. The judgment was afterwards affirmed in the Exchequer Chamber, 3 B. & B. 297.

For further observations on this subject, see the Preliminary Discourse.

CHAPTER XII.

PROBABLE CAUSE.

*IN the next place, the occasion of publishing may supply an absolute defence, independently of the actual intention of the publisher but dependant on the existence of *probable* or *reasonable* cause for the act. [*276]

It has been seen (a) that the ordinary action for slander is not maintainable where the publication has been made in a judicial proceeding, according to the due course of law. But a special action on the case may be supported in respect of a malicious and unfounded prosecution. So, also, it seems, may such an action be supported against an advocate who has abused his professional situation, for improper and malicious purposes. So, also, is such an action maintainable in respect of a malicious disparagement of a man's title to an estate though it be made by one who himself claims to be entitled. But in all these cases, and perhaps in some others, *it seems that the existence of probable or reasonable [*277] cause for the charge or claim would constitute a legal bar to the action ; or, as it would perhaps be more correct to state it, the want of such probable cause would be essential to the action.

It is obvious that the allowing probable cause to operate as a defence must depend on principles of policy and convenience.

On general principles of expediency, the absence of probable cause

(a) *Supra*, Chap. 10.

is essential to the action, and the existence of probable cause is a complete bar independently of the actual intention of the defendant in those cases where it would be impolitic on the one hand to allow the *mere occasion* to operate as an absolute bar ; but where, on the other it would be inconvenient to make the liability depend on the *mere motive* of the publisher, and where public convenience requires that the act should be protected, provided reasonable ground for doing it really existed.

Thus, in the case of a malicious charge in the ordinary course of justice, it would be attended with great mischief and vexation if the prosecutor were to be absolutely exempted from responsibility, although he had wantonly perverted the course of law to malicious and vexatious purposes ; it might, on the other hand, be productive of evil to make a prosecutor amenable in damages when [*278] he failed to establish the charge in all cases where *he had acted maliciously ; for in numerous instances it might be highly expedient that judicial investigation should take place though the prosecutor be not actuated by the love of justice, but by the basest motives of personal malice. The public may in numerous instances, be benefited by the promotion of inquiry, notwithstanding the immorality of the prosecutor. And, therefore, where a reasonable and probable cause for making the charge really exists and consequently where the public has an interest in promoting inquiry, be the motives of the prosecutor ever so culpable in a moral point of view, it becomes a matter of legal policy and discretion to exempt him from civil liability ; and therefore, in all actions for malicious prosecutions, the want of probable cause is not only invariably essential to the action, but proof of the negative is incumbent on the plaintiff (c).

The requiring such proof from the plaintiff is not only a rule of policy and convenience, but of strict natural justice when it is considered how often it happens that the facts on which a criminal prosecution is properly founded, are confined to the knowledge of the prosecu-

(c) 1 T. R. 520. 1 Salk. 14, 15, 21. 5 Mod. 394, 5. 1 Vent. 86. Carth. 415. See the cases, Starkie on Evidence, tit. Malicious Prosecution.

tor alone, and that if this proof were not required from the *plaintiff how often a bonâ fide prosecutor would be [*279] exposed to an action against which he might have no defence, from his inability to prove the probable cause which really existed (*d*).

What shall amount to probable or reasonable cause, in this as well as other cases, may be either a question of law, arising simply on the mere facts, or it may depend on the conclusion of the jury from the facts. It is a question of law arising simply upon the facts, and independently of any general conclusion made by a jury in all cases where, from the mere facts themselves, the court can, by the aid of any rule or principle of law, draw or exclude the inference of probable cause from such facts (*e*). [*a a*].

(*d*) *Infra* tit. evidence, and see Starkie on Evidence, Pt. iv., 911.

(*e*) Thus in the case of *Golding v. Crowle*, M. 25 G. 3. B. N. P. 14, it is said, "if the plaintiff do prove malice, yet if the defendant show a probable cause, he shall have a verdict, and the judge, not the jury, is to determine whether he had a probable cause; and therefore, where the plaintiff having brought an action against the defendant for a malicious prosecution for perjury obtained a verdict, upon a motion for a new trial, the court set it aside, (it appearing, on the report of the judge that there was probable cause) not as a verdict against evidence, but as a verdict against law; (note a quære is added in the margin). So in the case of *Candell v. Loudon*, cor. Buller, J. Guildh. after Trin. 1785, cited in *Johnstone v. Sutton*, 1 T. R. 520. Buller, J. stated to the jury that there were two questions to be determined: 1st. whether the facts in evidence were true; 2dly, whether, if true, they showed a want of reasonable or probable cause; and the learned judge added, that what is reasonable or probable cause is matter of law, and he then gave his opinion on the case. And in the case of *Johnstone v. Sutton*, 1 T. R. 493, Lords Mansfield and Loughborough, in stating their opinions for reversing the judgment, observe that the question of probable cause is a mixed question of law and fact. Whether the circumstances alleged to show it probable or not probable are true and existed is a matter of fact; whether, supposing them to be true, they amount to a probable cause, is a question of law, and upon this distinction proceeded the case of *Reynolds v. Kennedy*, 1 Wils. 232. In that case an action for a malicious prosecution was brought against the defendant for maliciously proceeding by information before certain sub-commissioners of the excise in Ireland in respect of certain goods of the plaintiff's, which had been condemned by the sub-commissioner, but which condemnation had been reversed on appeal

[*280] *Where, on the other hand, the distinction between probable and improbable, reasonable or unreasonable, is

to the commissioners. After a verdict for the plaintiff, judgment was arrested, and that judgment was affirmed in the K. B., upon error brought, the court being of opinion that the declaration which showed a condemnation in the first instance by the sub-commissioners was *felo de se*; for their judgment justified the proceeding, and the reversal of their judgment, on appeal, did not afford any inference of malice on the part of the defendant below.

So in the case of *Isaacs v. Howard*, 2 Starkie's C. 167, *Ld. Ellenborough* delivered his opinion to the jury, that in point of law a constable was not justified in taking a party into custody, without warrant, on a charge of having received stolen goods, on the mere information of a boy who was one of the principal felons. See also as to other cases, where the conclusion as to what is reasonable is considered as a question of law. *Co. Litt.* 56 b. 4 *Co.* 27 b. *Hobart v. Hammond*, Cro. J. 264. *Stodder v. Harvey*, Cro. Eliz. 583. *Bell v. Wordell*, Willes, 202. *Ld. Mansfield*, 241. *Hill v. Yates*, 2 Moore 80. *Starkie on Evidence*, p. iii. 416. So again, there is no probable cause in law where the party does not act upon those facts which might of themselves have supplied probable cause, but acts against his better knowledge that there was, in truth, no probable cause; for as to one who is better informed there is no probable cause. See *Haw. P. C. b. 2. c. 12. s. 15.* Sir Anthony Ashley's case, 12 *Co.* 72. So, though a party would, in point of law, be justified in arresting another, if he acted bona fide on the opinion of a professional adviser, yet if he acted not upon that opinion, but from malicious motives, believing that he must fail, there would, in point of law, be a want of probable cause. *Ravenga v. Macintosh*, 2 B. & C. 693.

But, on the other hand, although the authorities most abundantly prove that probable or reasonable cause *may be* matter of mere judicial inference, from the mere facts, independently of the jury, it by no means follows that such must *always* be the case: on the contrary, it seems to be manifest that whenever the facts are numerous and complicated, and do not fall within any particular rule or principle of law, then the jury must draw the conclusion in fact, and that the conclusion in law will follow such conclusion in fact. Thus, in the case of *Reynolds v. Kennedy*, cited in the opinion given by Lords Mansfield and Loughborough in the case of *Johnstone v. Sutton*, the court held, that the very fact that the sub-commissioners had, in the first instance, condemned the goods were sufficient to establish the existence of probable cause as a question of law, yet in this case, as well as in the others, where the court has made the legal inference, some prominent facts have existed on which the court could found a general rule, which was to govern not only the individual case, but all which should be within its scope. But, in many instances, the facts are so numerous and so complicated as to render it difficult to apply any general rule, and where

not defined by any rule or principle *of law, the conclusion must, it seems, be drawn by the jury (f). [*281]

it might be highly inconvenient to do so on account of multiplying legal rules and distinctions to a very great extent. A prosecution may be instituted on such unsatisfactory or satisfactory grounds, in point of evidence, that the court might find no difficulty in deciding as a matter of law on the absence in the one case, or the existence in the other of probable cause. Thus, in the case of *Isaacs v. Brand*, 2 Starkie's C. 167, Lord Ellenborough held that a mere declaration by a principal felon that another person had received the goods, did not afford a probable or reasonable ground for arresting the latter; on the other hand, the fact of finding stolen goods recently after the felony in the possession of another would certainly, in point of law, show probable cause for an arrest; but between such extreme cases, there may be an infinite number of intermediate ones where the law can lay down no precise rules as to the existence of reasonable cause, and consequently where the inference must be drawn by the jury. Many instances occur in practice, in actions of this nature as well as others, where the question of what is probable or reasonable is properly left to the jury. Thus, in the case of *Isaacs v. Brand*, 2 Starkie's C. 167, Lord Ellenborough left the question of probable cause, under the circumstances, to the jury, and his lordship pursued the same course in *Brookes v. Warwick*, 2 Starkie's C. 389. And in general it seems that where no acknowledged rule or principle of law defines the limits between probable and improbable, reasonable and unreasonable, the question is one for the jury, under all the circumstances of the case. See Lord Kenyon's observations in *Hilton v. Shepherd*, 6 East. 14 n. *Fry v. Hill*, 7 Taunt. 397. Starkie on Evidence, tit. Law and Fact, part iii. p. 418.

[a a] And see *Davis v. Hardy*, 6 Barn. and Cres. 225. Davis hired a chaise in the name of Hardy and received from the assignee of Martin, a bankrupt, the amount of the chaise hire; he did not pay it to the innkeeper or to Hardy, nor did he mention to the latter that he had received the amount. Upon a charge being preferred against Davis, he was examined before one of the magistrates, and admitted most of the facts. On this evidence, the learned judge at the trial was of opinion, that there was sufficient evidence of the want of probable cause for indicting Davis for embezzlement. Staines, the proprietor of the chaise, was afterwards called as a witness for the defendant, and it appeared on his evidence that he having applied to Davis for payment, Davis requested him not to tell Hardy, for it would do him a great injury. The learned judge being of opinion that the subsequent facts coupled with the former, shewed reasonable and probable cause, nonsuited the plaintiff, though pressed by the defendant's counsel to leave it to the jury whether they believed Staines's evidence; and the court of King's Bench refused to grant a new trial.

(f) See note (e) *supra*, p. 279.

[*282] The same protection which is afforded to a *party in a judicial proceeding is with some limitation extended to a professional advocate. He is not subject to an action,

[*283] provided the facts *which he alleges are pertinent to the cause, and are suggested by his client; for though a counsel may be expected to exercise a discretion whether the parts which he states, if true, be material to the issue, yet it would be too much to expect that he should take notice, at his peril, whether the facts themselves be true or false. In the case of *Wood v. Guston (g)* it is laid down, that “if a counsel speaks scandalous words against one in defending his client’s cause, an action lies not against him for so doing, for it is his duty to speak for his client, and it shall be intended to be spoken according to his client’s instructions.

In the case of *Brooke v. Sir Henry Montague (h)* the plaintiff brought an action against the defendant for these words; “he was arraigned and convicted of felony.” The defendant pleaded, that

the plaintiff, at another time, brought false imprisonment
[*284] against J. S., one of the serjeants *of London, who justified by warrant from Sir N. Moseley, mayor of London, for arresting him, to find sureties for the good behaviour, and they were thereupon at issue, and found against the plaintiff, who thereupon brought an attain. And that the defendant, being *consiliarius et peritus in lege* was retained to be counsel with the petty jury, and in evidence at the trial in London, spake those words in the declaration; and Yelverton and Coke, attorney-general, being of counsel for the defendant, the court resolved that the justification was good, for a counsellor in law retained hath a privilege to enforce any thing which is informed unto him for his client, and to give it in evidence, it being *pertinent to the matter in question*, and not to examine whether it be true or false; but it is at the peril of him who informs it; for a counsellor is, at his peril, to give in evidence that which his client informs him, being pertinent to the matter in question, otherwise action on the case lies against him by his client, as Popham said; but matter not pertinent to the issue or the matter in question he need not deliver, for *he is to discern, in his discretion*

what he is to deliver and what not, and although it be false he is excusable, being pertinent to the matter ; but if he give in evidence any thing *not material* to the issue, which is scandalous, he ought to aver it to be true, otherwise he is punishable ; for it *shall be intended as spoken maliciously and without [*285] cause, which is a ground for an action. So, if a counsellor object matter against a witness which is slanderous, if there be cause to discredit his testimony, and it be pertinent to the matter in question, it is justifiable what he delivers by information, although it be false ; so *here it is material evidence to prove him a person fit to be bound to his good behavior, and in maintenance of the first verdict*, therefore his justification is good.

The same principle extends to a comment made by a counsel upon facts proved in the cause, or proposed to be proved and relevant to the matter in issue (i).

(i) *Hodgson v. Scarlett*, 1 B. & A. 232. The words stated in the first count of the declaration were these, “ some actions are founded in folly, some in knavery, some in both ; some in the folly of the attorney, some in the knavery of the attorney, some in the folly and knavery of the parties themselves ; Mr. Peter Hodgson was the attorney of the parties, drew the promissory note, and fraudulently got Bowman to pay into his hands £150 for the benefit of the plaintiff. This was one of the most profligate things I ever knew done by a professional man. Mr. Hodgson is a fraudulent and wicked attorney.” In the second count, the words were stated “ Mr. Hodgson is a fraudulent and wicked attorney ;” plea general issue. At the trial at the Lancaster Assizes, before Wood Baron, Raine opened the case, and stated that the action was brought for words spoken by the defendant, in an address to the jury as counsel, in a cause, tried at the preceeding assizes, and that they were not warranted by the facts of the case ; on this the learned judge said, “ I take it for granted, from your opening, that there was such a cause tried, and that there was a question in it, respecting the drawing of the promissory note as mentioned, and that these words, if spoken, were part of the defendant’s speech to the jury, and had reference to that transaction.” To this, both sides assented, and he then added, “ the observations might be too severe ; that I can say nothing about, but as they were relative to the subject matter of the cause as at present advised, I think the action not maintainable. The learned judge, therefore, being of opinion that it was not for the jury to try whether the cause or occasion for speaking the words was sufficient to warrant them though there was nothing to leave to them, even supposing the words to be proved, and nonsuited the plaintiff.

It seems, however, to be doubtful whether, even in the
 [*286] *case of an advocate, if it could be proved that he acted
 of express malice, and without probable or reasonable
 cause, an action might not be maintained; and the court in the case
 last cited gave no opinion on the subject; but it seems that, at all
 events, the plaintiff could not even then recover in an
 [*287] ordinary action for defamation, but *must resort to a
 special action, alleging express malice (*k*) and the want of
 probable cause.

Again where a party extra-judicially asserts his title to the lands
 of another, the very fact of his making a claim precludes the owner
 who is injured *by it from recovering in an ordinary action for slan-

The court of King's Bench afterwards refused to grant a new trial, on the
 ground that the words complained of were relevant and pertinent to the original
 cause in which they had been uttered, and consequently, that, according to the
 principle laid down in the case of *Brooke* against *Sir Henry Montague*, they
 were not actionable [1].

(*k*) See the observations made by Holroyd, J. in the case of *Fairman v. Ives*,
 1 B. & A. 645. In the case of *Hodgson v. Scarlett*, 2 B. & A. the same learn-
 ed judge observed, with a view to the due administration of justice, counsel are
 privileged in what they say; unless the administration of justice is to be fetter-
 ed, they must have free liberty of speech in making their observations, which it
 must be remembered may be answered by the opposing counsel, and are com-
 mented on by the judge, and are afterwards taken into consideration by the jury
 who have an opportunity of judging how far the matter uttered by the counsel
 is warranted by the facts proved; therefore, in the course of the administration
 of justice, counsel have a special privilege of uttering matter even injurious to
 an individual, on the ground that such a privilege tends to the administration of
 justice. And if a counsel in the course of a cause, were to utter observations in-
 jurious to individuals, and not relevant to the matter in issue, it seems to me that
 he would not therefore be responsible to the party injured, in a common action for
 slander, but that it would be necessary to sue him in a special action on the
 case, in which it must be alleged in the declaration, and proved at the trial, that
 the matter was spoken maliciously and *without reasonable and probable cause*.
 This may be illustrated by the common case of a false charge of felony exhib-
 ited before a justice of the peace; there an action upon the case, as for defama-
 tion, will not lie, because the slander is uttered in the course of the adminis-
 tration of justice, but the party complaining is bound to allege that it was made
 without reasonable or probable cause.

[1] See *Hasting v. Lusk*, 22 Wendell 410.

der, independently of any inquiry as to the sincerity of the claimant (*l*); for it would be highly inconvenient and impolitic to subject the motive and intention of a claimant generally to legal inquiry. But on the other hand, where a party makes such a claim *maliciously* and *without any probable cause*, he is liable to a special action alleging malice and the want of probable cause (*m*).

So that if B. published that he had a lease of Blackacre for one thousand years, he would not be liable to an ordinary action for slander, though he had no such lease (*n*). But still he would be liable to a special action on the case if he made such an assertion knowing it to be false, or as it seems, without any probable cause.

*The plaintiff (*o*) declared, that he was seized of the manor and castle of H. by purchase from Lord Audley, and that he was about to demise the castle and manor of H. to Ralph Egerton for a term of twenty-two years; that the defendant said, "I have a lease of the castle and manor of H. for ninety years," and then and there showed and published a demise, supposed to be made by George Lord Audley, grandfather to the said Lord Audley, for ninety years, to Edward Dickenson her husband, and published the said demise as a good and true lease, when, in fact, the lease was counterfeited by her husband, and the defendant *knew it to be counterfeited*; by reason of which words, the said R. E. did not proceed to accept the plaintiff's lease. The [*289]

(*l*) For, according to the judgment of the court, in the case of *Gerrard v. Dickenson*, 4 Co. 18, if an action should lie where the defendant himself claims an interest, how can any make claim or title to any land, or begin any suit, or seek any advice, or seek advice and counsel least he should be subject to an action which would be inconvenient, and that this was agreeable to the opinion in *Banister's case*, that no action lies against one who publishes another to be his villein without adding something by way of threat which occasions special damage.

(*m*) *Infra*. 289.

(*n*) *Jenk.* 217. *Cro. E.* 14. *Mo.* 144, 188, 410. *Roll. R.* 409. 4 *Rep.* 18. *Yelv.* 89. *Cro. Car.* 140. *Cro. J.* 197, 485. 1 *Roll. R.* 244. 3 *Buls.* 75. *Pal.* 529.

(*o*) *Sir G. Gerrard v. Dickenson*, 4 *Rep.* 18. *Cro. Eliz.* 197.

defendant, in her plea, denied her knowledge of the forgery ; and the plaintiff demurred. And it was resolved,

1. That if the defendant had affirmed and published that the plaintiff had no right to the castle and manor of H., but that she herself had right to them, in that case, because the defendant herself pretended right to them, although in truth she had none, no action would lie.

And, therefore, that for the said words, “ I have a lease of the manor of H. for ninety years,” although *it is false, yet [*290] no action lies for slandering his title or interest in the said castle or manor. (*p*).

2dly. That there was other matter in the declaration sufficient to maintain the action, and that was because it was alleged in the declaration, that the defendant knew of the communication of the making of the lease to R. Egerton, and knew, also, that the lease was forged and counterfeited, and yet, against her knowledge, she had affirmed and published that it was a good and true lease.

So in the case of *Goulding v. Herring* (*q*) it was agreed, that though the plaintiff claims title, yet if it be found to be done *maliciously*, the action lies ; but if, upon evidence, any probable cause of claim appears, it ought not to be found maliciously. So according to Rolle, C. J. (*r*), “ If I have colour of title to land, and I say to another, I have better title to the land than you, no action will lie against me, though my title be not so good as the other is.”

Hence it appears, that although the making such a [*291] claim be sufficient to repel the ordinary *action for slander, yet that a special action lies where a party makes such a claim vexatiously, and without probable cause. Those cases where a party who disparages the title of another makes no claim himself, fall, as will be seen, under a very different consideration.

(*p*) And note, that although it appeared by the defendant’s bar, that she had no interest in the lease, yet as the matter alleged in the declaration did not maintain the action, the bar would not make it good.

(*q*) 1 Roll. 141.

(*r*) Sty. 414.

CHAPTER XIII.

MALICE IN FACT.

*In the next place, when do the occasion and circumstances of the publication afford a qualified defence dependent on the absence of express malice? In other words, when is express malice or malice in fact essential to the right of action? The extensive principle which governs this class of cases, where the existence of express malice is a civil responsibility, comprehends all where the author of the alleged mischief acted in the discharge of any public or private duty, whether legal or moral, which the ordinary exigencies of society, or his own private interest, or even that of another called upon him to perform, but where the occasion does not furnish an absolute defence, independently of the question of intention, as, on the one hand, it would be contrary to common convenience to fetter mankind in their ordinary communications by the apprehension of vexatious litigation; so, on the other, would it be highly mischievous to allow men to inflict the most cruel injuries to reputation and character with impunity, under the cloak and pretence of discharging some duty to themselves or to society, when they were, in fact, actuated by the most malicious intentions. The law, therefore, in such instances, and, [*292] as it seems, most wisely, makes the issue to depend on the existence or absence of express malice; and thus an ample shield of protection is extended to all who act fairly and prudently, [*293]

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in order that men may not be deterred, by the fear of an action or prosecution, from making communications which are either important to themselves or beneficial to the public.

Among the most prominent of the decisions comprehended within the present class are those which have arisen from actions brought by servants against masters.

The giving a character of a servant is one of the most ordinary communications which a member of society is called on to make, but it is a duty of great importance to the interests of the public, and in respect of that duty, a party offends grievously against the interests of the community in giving a good character where it is not deserved; or against justice and humanity in either injuriously refusing to give a character (*a*), or in designedly misrepresenting one to the detriment of the individual.

The general rule is that where a master gives a character of a servant, unless the contrary be expressly proved, it will [*294] be presumed that the *character was given without malice (*b*), and the plaintiff, to support the action, must prove that the character was both *falsely* and *maliciously* given [1].

An action was brought (*c*) by the plaintiff for publishing the following letter to one Collier, respecting the plaintiff's character as a servant: "Two days I gave him money to go into the city and buy books. When he came home, I desired him to reckon up his account; he did so. But being one day more curious than I sometimes was, I looked over his account, article by article; and in one

(*a*) No action will lie against a master for refusing to give a character. *Carrol v. Bird*, 3 Esp. C. 204.

(*b*) *Burr*. 2425. *Edmonson v. Stephenson*, B. N. P. 8. Lord Ellenborough, in *Hodgson v. Scarlett*, 1 B. & A. 240, observed, "In the case of master and servant, the convenience of mankind requires that what is said in fair communication between man and man should be privileged, if made bona fide, and without malice. If, however, the party giving the character knows what he says to be untrue, that may deprive him of the protection which the law throws around such communications.

(*c*) *Weatherstone v. Hawkins*, 1 T. R. 110.

[1] But see *Patterson v. Jones*, 8 B. and C. 578, also note (*a a*) post page 301.

book I well knew the price of, I found he had charged me one shilling more than it cost, and that shilling he kept in his pocket. The next day, the very same affair ; and both these days my neighbor Metcalf was in my shop, and knows it well, and said he would not keep such a man a day, or something to that purpose. Two magazines he charged two shillings for binding, the people received no more than 1s. 8d. and this I can prove." A verdict was
 *found for the plaintiff on one of the counts of the dec- [*295]
 laration, containing the above letter, subject to the
 opinion of the court on the following case :

The plaintiff was brother-in-law to Mr. Collier ; he was in the service of the defendant, and was by him turned away. Rogers, to whom the plaintiff was recommended to be taken as a servant, applied to the defendant for a character, which not being advantageous, but to the effect stated in the declaration, he (Rogers,) did not take him. Collier, upon this, repeatedly called upon the defendant, upon which the letter stated in the declaration was written, with an intent to prevent an action by the plaintiff for the words by the defendant to Rogers. The writ was sued out on the very day the letter was written.

The question for the opinion of the court is, whether this action lies.

Lord Mansfield, C. J. " I have held more than once, that an action will not lie by a servant against his former master, for words spoken by him in giving a character of the servant.

" The general rules are laid down as Mr. Wood (the plaintiff's counsel) has stated ; but to every libel there may be a necessary or implied justification from the occasion, so that what, taken abstractedly, would be a publication, may, from the occasion, prove to be none, as if it were read in *a judicial pro- [*296]
 ceeding. Words may also be justified on account of
 their subject matter, or other circumstances. In this case, instead of the plaintiff's shewing it to be false and malicious, it appears to be incident to the application *by Rogers* to the master of the servant ; and the letter was written to the brother-in-law of the plaintiff, for the express purpose of preventing an action being brought."

Buller, J. " This is an exception to the general rule, on account

of the occasion of writing the letter. Then it is incumbent on the plaintiff to prove *the falsehood of it*: and in actions of this kind, unless he can prove the words to be *malicious* as well as *false*, they are not actionable."

Judgment for the defendant.

In the case of *Rogers v. Sir Gervase Clifton Bart. (d)*, the following facts appeared in evidence. The plaintiff having been hired as a servant by the defendant, lived about six months in his service, when the latter turned him away without giving him a month's warning; in consequence whereof, the plaintiff, conceiving himself entitled to a month's wages, refused to quit the service without being paid that sum. On this refusal, the defendant procured an officer

from the public office to put the plaintiff out of the house, [*297] and employed his attorney to settle his wages with him.

Immediately after this, the defendant, who was going into the country, called on Mr. Holland, with whom the plaintiff had previously lived, to inform him that the plaintiff had behaved in an impertinent and scandalous manner: that he the defendant had discharged him from his service, when the plaintiff refused to go without a month's wages; and he therefore desired Mr. Holland not to give him another character. While the plaintiff was in the country he offered himself to a Mr. Hand, stating that he had lived with the defendant. Upon which, Mr. Hand wrote to the defendant for a character; and received the following answer:

"Sir,—In answer to your's, wich came to hand yesterday, I beg leave to acquaint you, that Thomas Rogers did not live with me six months, as he has told you, and I wish I had never taken him into my house, as he is a bad tempered, lazy, impertinent fellow, and has given me a great deal of trouble, as I was obliged to send an officer from the Marlborough street Police Office, to put him and his things out of my house, and also to employ Mr. Barnet, my attorney, of Soho-square, to settle his wages; as I look upon it he will take any advantage he can.

"I am, Sir, your most obedient humble servant,

"GERVASE CLIFTON."

*Upon receipt of this letter, Mr. Hand refused to take the plaintiff into his service. It appeared that Mr. Holland never was applied to for a character of the plaintiff, after the communication made to him by the defendant; and Mr. Holland stated, that without such communication he should have declined giving another character to the plaintiff. The plaintiff also proved, by servants of the family, that while in the defendant's service he had conducted himself well, and that no complaints of the nature ascribed to him in the defendant's letter had all that time existed. The jury found a verdict for the plaintiff with £20 damages, but liberty was reserved to the defendant to have a nonsuit entered. [*298]

After the case had been argued, Lord Alvanley, C. J. said, " If it were to be understood, that whenever a master gives a bad character to a servant who has quitted his service, he may be forced by the servant, in justification of such conduct as a master, to prove the particulars which he has stated respecting the servant, it would be impossible for any master, (so understanding the law, at least with any regard to his own safety) to give any character but the most favourable to a servant, and consequently impossible for a servant, not entitled to the most favourable character, to obtain any new place. In the two *cases of *Edmondson v. Stevenson* (e), and *Weatherstone v. Hawkins* (f), the law upon this subject appears to me to be laid down as clearly as can be wished. Unquestionably the master, who has given a bad character of a servant to persons enquiring after his character, is not bound to substantiate by proof what he has said; but it is equally clear, that the servant may, if he can, prove the character *to be false*, and the question between the master and servant will always, in such case, be, whether what the former has spoken concerning the latter be malicious and defamatory. In this case, we are to consider whether the evidence adduced by the plaintiff was sufficient to be left to the jury. His lordship, after stating the evidence, proceeded to observe, that the circumstance of the plaintiff's refusal to quit his master's house till his wages had been paid, was the only act of impertinence prov-

(e) B. N. P. 8.

(f) 1 T. R. 110.

ed against him; and that the defendant was not called upon by that single act to seek out Mr. Holland, and officiously to state what he did; that if a servant were strongly suspected of having committed a felony whilst in his master's service, it would be the master's duty to warn others from taking him into their service; but [*300] that, in the principal case, the offence imputed to the plaintiff appeared to be of a trivial nature. His lordship concluded by saying, that he should have grievously invaded the province of a jury, had he not left it to them to say whether, considering all the circumstances of the case, the defendant's conduct was not malicious, and that he did not consider himself at liberty to disturb the verdict they had given.

Rooke, J. was of the same opinion, and wished it to be understood as his opinion, that a master may at any time, *whether asked or not*, speak of the character of his servant, provided that he speak in the honesty of his heart; and that an action cannot be maintained against him for so doing; at the same time, masters are not warranted in speaking ill of their servants from heat and passion.

Chambre, J. referred to the case of *Lowry v. Aikenhead* (g), before Lord Mansfield. In that case, the rule laid down by Lord Mansfield was, "That where a person, intending to hire a servant, applies to a former master for a character, the master is not bound to prove the truth of the character he gives; for what he speaks of the servant, he does not speak officiously, but only discloses that which rests in his knowledge alone; but that where a master speaks ill of a servant, without any previous application having [*301] been made to him, there he must plead and prove the truth of the character in justification.

And the rule was discharged.

It appears, therefore, to be fully established, that a servant, in an action against a former master, must prove express malice.

It seems to have been laid down generally by Lord Mansfield, in the case cited by Mr. Justice Chambre, that where a master, *unasked*, gives a bad character of a servant, he may justify as in other cases; and though Mr. J. Rooke seems to have expressed an opin-

ion somewhat different, there can be no doubt that the manifestation of forward and officious zeal on the part of a defendant, who, *uninvited*, gives a character to the prejudice of his former servant, would be a material guide to a jury in ascertaining his real motive [*a a*].

Where a plaintiff, knowing the character which his master will give, procures it to be given for the sake of founding an action upon it, he will not be allowed to recover (*h*).

Many other cases may be referred to as illustrative of the general principle that a publication warranted by an occasion apparently beneficial and honest is not actionable in the absence of express malice.

The defendant who was sergeant in a volunteer
*corps, of which the plaintiff also was a member, repre- [*302]

[*a a*] In *Pattison v Jones*, 8 Barn. and Cres. 578, the master wrote a first letter without a previous application having been made for a character of the servant, but wrote a second in answer to inquiries made of him as to the plaintiff's character. Lord Tenterden, C. J. left it to the jury to say, whether the communication contained in that letter was made by him *bonâ fide*, acting under a belief, that he was discharging a duty which he owed to the party who was about to take the plaintiff into his service, or whether it was made maliciously, with an intention of doing an injury to the plaintiff; and the jury having found that the communication was maliciously made, the court refused to disturb the verdict.

Littledale, J. observed, "At all events, where the master volunteers to give the character, stronger evidence will be required that he acted *bonâ fide*, than in the case where he has given the character after being required to do so."

In the same case, the lord chief justice, on evidence being tendered of the truth of the statements made in the letter, in order to show that the communication was made *bonâ fide*, expressed some doubt whether such evidence was receivable under the plea of the general issue, but received the evidence.

In the case of *Child v. Affleck*, 9 B. and C. 403. the defendant had, on application for a character, stated, in a written answer, that the plaintiff had, whilst in her service, conducted herself disgracefully, and that she had since been a prostitute; and a similar statement had been made by the defendant to persons who had recommended the plaintiff to her; it was held, that they were privileged communications, and that the plaintiff was properly nonsuited for want of proof of malice.

(*h*) Per Lord Alvanley, 3 B. and P. 592. *King v. Waring, et ux.* 5 Esp. C. 13.

sented to the committee, by whom the general business of the corps was conducted, that the plaintiff was an unfit and improper person to be permitted to continue a member of the corps.

The words charged in the declaration were, that the defendant had said that the plaintiff had been the executioner of the King of France, and that he had clapped his hands, rejoicing at the event, adding, that France would then be one of the first countries in the world.

It appeared in evidence, that the plaintiff was a Frenchman, and that the defendant had not made use of the words publicly, but had communicated them to the officers of the corps, who constituted the committee for its regulation.

Lord Ellenborough said, that it was not to be allowed that such an action could be sustained. It was a communication made upon a most important matter for their consideration, whether foreigners, the natives of a country in open war with us, were to learn the use of arms in a country threatened to be invaded by the other. The action was most ill advised and improper.

In *Johnson v. Evans (i)*, the words were, "She is a thief, and tried to rob me of part of her wages." It appeared, [*303] upon the trial, that the *plaintiff had been servant to the defendant. Upon a dispute taking place he discharged her, and some difference arising respecting the payment of her wages, he charged her with having attempted to cheat him respecting her wages, and spoke the words as laid; but the plaintiff failed in proving them to have been spoken at that time. Having, however, sent for a constable, in order to take her into custody, he made use of the same words to the constable when he came, to whom he meant to have given her in charge, but which in fact he did not do. The constable proved the words as spoken; but it further appeared, in the course of his evidence, that the words had been spoken by the defendant, addressed to him in his character of constable, and in the course of the charge and complaint which the defendant made to him against the plaintiff.

Lord Eldon, C. J. said, that the evidence given of the speaking of the words laid in the declaration was not such as to induce him to direct the jury to find a verdict for the plaintiff. Words used in the course of a legal or judicial proceeding, however hard they might bear upon the party of whom they were used, were not such as would support an action for slander. In this case, they were spoken by the defendant under a belief of the fact, and when he was about to proceed legally to punish it, it would be a matter of **public inconvenience*, and operate to deter [*304] persons from preferring their complaints against offenders, if words spoken in the course of their giving charge of them, or preferring their complaint, should be deemed actionable. Plaintiff nonsuited [1].

Still this, it seems, amounts to a *prima facie* defence only, liable to be overthrown by proof of express malice on the part of the defendant, as by shewing that he knew at the time that the charge was false. In *Smith v. Hodykins (k)*, the case was this. The plaintiff assaulted and beat the defendant on the highway. The defendant meeting a constable, requested him to take charge of the plaintiff; and the constable refusing to arrest the plaintiff unless the defendant would charge him with the commission of a felony, the defendant did so, and judgment was given on demurrer for the plaintiff; the court observing, that there was no ground for the charge of felony.

And where property has been actually stolen (*l*), the defendant is not warranted in the communication of a suspicion, which in fact is unfounded, except for the purpose of legal injury [*a a*].

Under this class of communications may not improperly be ranked

(*k*) Cro. Car. 276.

(*l*) *Powell v. Plunket*, Cro. Car. 52. *Sed vide*.

[*a a*] Although statements made in regular proceedings at law are privileged if *bonâ fide* made, though they may not be true, yet a letter addressed to a judge being an irregular and improper proceeding, cannot be considered as falling within the class of privileged communications. *Gould v. Hulme*, 3 C. and P. 625.

[1] Note [1] p. 251. *supra*. See also *Burlingham v. Burlingham*, 8 Cowen 41. *Allen v. Crofoot*, 2 Wendell 515, and *Lathrop v. Hyde*, 25 Id. 448.

those publications whose professed object is to discuss, for the information of the public, the merits of the literary productions of the day. The authors of these, in the detection and exposure of misrepresentations in fact, false inferences, vicious principles and bad taste, undertake the discharge of a most difficult and important public duty, and in return are privileged in the most unlimited exercise of their reasoning powers, and of their talents for wit or satire, so long as it is confined to its legitimate object, the merits of the work before them, and is not perverted and abused for the purposes of personal defamation or the gratification of private malice.

In the case of *Sir John Carr v. Hood*, (m), the plaintiff stated, in his declaration, that he had been the author of several productive publications, called &c. but that the defendant intending to expose him to contempt and ridicule, had published a malicious and defamatory libel concerning the said Sir John, entitled, "My Pocket Book or hints for a righte merrie and conceited Tour, to be called, 'The Stranger in Ireland in 1805, by a Knight Errant.'" The same libel containing a malicious and defamatory print of and concerning the said Sir John and his books, called "Frontispiece," and entitled, "The Knight leaving Ireland with regret;" and representing, in the said print, a certain false, scandalous, malicious, defamatory, and ridiculous representation of the said Sir John, in the form of a man of ludicrous and ridiculous appearance, holding a pocket-handkerchief to his face, and appearing to be weeping; and also a certain false, malicious, and ridiculous representation of a man of ludicrous and ridiculous appearance, following the representation of Sir John, representing a man loaded with and bending under the weight of three large books, one of them having the word *Baltic* printed on the back thereof, and a pocket handkerchief appearing to be held in one of the hands of the said representation of a man, and the corners thereof appearing to be held or tied together as if containing something therein, with the printed word *Wardrobe* depending therefrom, for the purpose of rendering the said Sir John ridiculous, and there-

by meaning that one copy of the said first-mentioned book of the said Sir John, and two copies of the book of the said Sir John secondly above-mentioned, were so heavy as to cause a man to bend under the weight thereof; and that his the said Sir John's wardrobe was very small, and capable of being contained in one pocket handkerchief." The declaration concluded by laying, as special damage, that Sir John had been prevented from selling to Sir Richard Phillips, for £600, the copyright of a book of which the said Sir John was the author, containing an account of a tour of the said Sir John through part of Scotland.

*Lord Ellenborough, as the trial was proceeding, [*307] intimated an opinion, that if the book published by the defendant only ridiculed the plaintiff *as an author*, the action could not be maintained.

Garrow, for the plaintiff, allowed, that when his client came forward as an author, he subjected himself to the criticism of all who might be disposed to discuss the merits of his works, but that criticism must be fair and liberal; its object ought to be to enlighten the public, and to guard them against the supposed bad tendency of a particular publication presented to them, not to wound the feelings and ruin the prospects of an individual; if ridicule was employed, it should have some bounds. While a liberty was granted of analyzing literary productions, and pointing out their defects, still he must be considered as a libeller, whose only object was to hold up an author to the laughter and contempt of mankind. A man with a wen upon his neck perhaps could not complain if a surgeon, in a scientific work, should minutely describe it, and consider its nature and the means of dispersing it; but surely he might support an action for damages against any one who should publish a book to make him ridiculous on account of his infirmity, with a caricature print as a frontispiece. The object of the book published by the defendant clearly was, *by [*308] means of immoderate ridicule, to prevent the sale of the plaintiff's works, and entirely to destroy him as an author. In the late case of *Tabert v. Tipper* (*n*), his lordship had held, that a

publication by no means so offensive or prejudicial to the object of it, was libellous and actionable.

Lord Ellenborough. "In that case, the defendant had falsely accused the plaintiff of publishing what he had never published; here the supposed libel has only attacked those works of which Sir John Carr is the avowed author; and one writer, in exposing the follies and errors of another, may make use of ridicule, however poignant. Ridicule is often the fittest weapon that can be employed for such a purpose. If the reputation or pecuniary interests of the person ridiculed suffer, it is *damnum absque injuriâ*. Where is the liberty of the press, if an action can be maintained on such principles? Perhaps the plaintiff's Tour through Ireland is now unsaleable, but is he to be indemnified by receiving a compensation in damages from the person who may have opened the eyes of the public to the bad taste and inanity of his compositions? Who would have bought the works of Sir Robert Filmer, after [*309] he had been refuted by Mr. Locke? *But shall it be said, that he might have sustained an action for defamation against that great philosopher, who was labouring to enlighten and ameliorate mankind? We really must not cramp observations upon authors and their works; they should be liable to criticism, to exposure, and even to ridicule, if their compositions be ridiculous; otherwise, the first who writes a book on any subject will obtain a monopoly of sentiment and opinion respecting it. This would tend to the perpetuity of error. Reflection on *personal character* is another thing. Show me an attack on the moral character of the plaintiff, or any attack upon his character, unconnected with his authorship, and I shall be as ready as any judge who ever sat here to protect him; but I cannot hear of malice on account of turning his works into ridicule."

The counsel for the plaintiff complaining of the unfairness of the publication, and particularly of the print affixed to it, the trial proceeded.

The Attorney-general having addressed the jury on the behalf of the defendants,

Lord Ellenborough said, every man who publishes a book commits

himself to the judgment of the public, and any one may comment upon his performance. If the commentator does not step aside from the work, or introduce *fiction* for the purpose of condemnation, he exercises a fair and legitimate right. In the present case, had *the party writing the criticism followed the [*310] plaintiff into domestic life for the purposes of slander, that would have been libellous ; but no passage of this sort has been produced, and even the caricature does not affect the plaintiff, except as the author of the book which is ridiculed. The works of this gentleman may, for aught I know, be very valuable, but, whatever their merits, others have a right to pass their judgment upon them,—to censure them if they be censurable, and to turn them into ridicule if they be ridiculous. The critic does a great service to the public, who writes down any vapid or useless publication, such as ought never to have appeared. He checks the dissemination of bad taste, and prevents people wasting both their time and money upon trash I speak of fair and candid criticism ; and this every one has a right to publish, although the author may suffer loss from it. Such a loss the law does not consider as an injury, because it is a loss which the party ought to sustain. It is, in short, the loss of fame and profit to which he was never entitled.

“ Nothing can be conceived more threatening to the liberty of the press than the species of action before the court. We ought to resist an attempt against free and liberal criticism at the threshold.” The Chief Justice concluded by directing the jury, that if the writer of the publication *complained of had not [*311] travelled out of the work he criticised for the purpose of slander, the action would not lie ; but if they could discover in it anything *personally slanderous* against the plaintiff, unconnected with the works he had given to the public, in that case he had a good cause of action, and they would award him damages accordingly. Verdict for the defendant (o).

(o) In the case of *Stuart v. Lovell*, 2 Starkie's C. 73, the plaintiff being one of the proprietors of the *Courier* newspaper, brought his action against the defendant and the editor of the *Statesman* : Lord Ellenborough, in summing up to the jury, observed, “ In the first the plaintiff was described as the prostituted *Courier*,

[*312] In the case of *Tabert v. Tipper*, alluded to in *the preceding one (*p*), the action was brought for a libel on the plaintiff, contained in a periodical work called “The Satirist, or Monthly Meteor,” insinuating that the plaintiff (who was a vender of children’s books) had published and vended books of an improper and immoral tendency.

Upon the question, whether a witness ought to be cross-examined as to the defendant’s having published particular books,

Lord Ellenborough observed, “The main question here is, *quo animo* the defendant published the article complained of; whether he meant to put down a nuisance to public morals, or to prejudice the plaintiff. To ascertain this, it is material to know the general nature of the defendant’s publications, to which the libel alludes, and I therefore think that the evidence is receivable. The plaintiff is bound to show that the defendant was actuated by malice, and the defendant discharges himself by proving the contrary. Liberty of criticism must be allowed, or we should neither have purity of taste nor of morals. Fair discussion is essentially nec-

[*313] essary to the truth of history and the advancement *of science. That publication, therefore, I shall never consider as a libel, which has for its object not to injure the reputation

and his full blown baseness and infamy were represented as holding him fast to his present connections, and preventing him from forming new ones. It was certainly competent to one public writer to criticise another, exerting his talents in all the latitude of free communication belonging to a public writer, and so it appeared to Lord Kenyon, in the case of *Harriot v. Stuart*, 1 Esp. c. 437. That the opinions and principles of a controversial writer were open to criticism and ridicule, in the same way as those of any other author, but that the privilege did not extend to calumnious remarks on the private character of the individual. In that respect the editor of a newspaper enjoyed the rights of protection in common with every other subject.

“Since then, the defendant in this case had stigmatised the plaintiff as the venerable apostle of tyranny and oppression, and as a man whose full blown baseness and infamy held him fast to his present connection, because they left him without the power of forming new ones; in all this, he undoubtedly had overstepped the limits which had been drawn, and by which his conduct ought to have been regulated.”

(*p*) 1 Camp. C. 350.

of any individual, but to correct misrepresentations of fact, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality."

But in the same case it appeared that the libel falsely imputed to the plaintiff the publication of some silly verses of an improper tendency, which were specified in the libel, and set forth in the declaration; and it was allowed on the part of the defendant, that the plaintiff had not published them, but it was contended that they were a fair specimen of his publications.

Lord Ellenborough, however, informed the jury, that it was certainly actionable, gravely to impute to a bookseller having published a poem of this sort, to which he was a stranger; as the evident tendency of the unfounded imputation was to hurt him in his business.

In the case of *Heriot v. Stuart* (q), it was held that no action was maintainable for asserting in a newspaper that another public newspaper was the most vulgar, ignorant and scurrilous journal ever published in Great Britain. But subsequent words, alleging that it was the lowest paper in circulation, *were [*314] deemed actionable, since they affected the sale and profits to be made by advertising.

In the case of *Dibdin v. Bostock* (r), which was an action for publishing a paragraph in a newspaper, stating that the songs at a place of public entertainment were not of the plaintiff's composition, as they professed to be, and representing the performances as despicable, and as gaining no applause except from persons hired for the purpose. Lord Kenyon observed, "The editor of a public newspaper may fairly and candidly comment on any place or species of public entertainment, but it must be done fairly, and without malice or view to injure or prejudice the proprietor in the eyes of the public; if so done, however severe the censure, the justice of it screens the editor from legal animadversion; but if it can be proved that the comment is unjust, is malevolent, or exceeding the bounds of fair opinion, it is a libel and actionable." [a a] [1]

(q) 1 Esp. C. 437.

(r) 1 Esp. C. 29.

[a a] In *Thompson v. Shackell*, 1 Moody and Malkin 187, on the trial of an

In the late case of *Dunne v. Anderson (s)*, it seems to have been doubted whether the plaintiff, by preferring a petition to parli-

action for an alleged libel concerning a picture of the plaintiff's exhibited at Somerset House, describing it as a mere daub, BEST C. J. *left it to the jury* to say whether the publication was a *fair and temperate criticism* on the painting of the plaintiff, or was made the vehicle of *personal malignity* towards the plaintiff. He added, "I myself have acted on the doctrine of my Lord Ellenborough in the case referred to, (*Carr v. Hood*), though I do not go quite so far as he did in that case, because I think no *personal* ridicule of the author is justifiable; but if this be really an *honest* criticism, and no more, the defendant is entitled to your verdict." Verdict for the defendant.

In the case of *Soane v. Knight*, 1 M. and M. 74, the plaintiff, an architect, complained of a libel published of him in his profession; the alleged libel professed to give an account of a new order of architecture, called the Bæotian Order, stating it to have been invented by the plaintiff, and illustrated the new order by examples of such buildings, all the buildings instanced being the works of the plaintiff. Lord Tenterden, in summing up to the jury, said, "This publication professes in substance to be a criticism on the architectural works of the plaintiff. On such works, as well as on literary productions, any man has a right to express his opinion, and however mistaken in point of taste that opinion may be, or however unfavorable to the merits of the author or artist, the person entertaining it is not precluded by law from its fair, reasonable, and temperate expression. It may be fairly and reasonably expressed, although through the medium of ridicule. In the present case, the censure is certainly strong, nevertheless, if you think the criticism fair, reasonable, and temperate, *although it may not be correct*, the defendant will be entitled to your verdict; if you think it unfair and intemperate, and written with the intention and for the purpose of injuring the plaintiff in his profession, by imputing to him that he acts on absurd principles of art, you will find for the plaintiff." Verdict for the defendant.

Whatever can be fairly said of the works of an author *or of himself, as connected with the work*, is not actionable, unless it appear that, under the pretext of criticism, the party takes the opportunity of calumniating the author. *M'Leod v. Wakeley*, 3 C. & P. 311.

[1] In *Cooper v. Lawson*, 8 Adolph. & Ellis 746, the libel stated that the plaintiff had become surety for a petitioner relative to an election for a member of parliament of a certain borough, and had made oath that he was qualified in point of property to become such surety, when in fact he was not able to pay his debts. The author of the libel asked why the plaintiff, who was unconnected with the borough, in reference to the election of the member of parliament should have incurred an exposure of his circumstances, and gave a re-

(s) 3 Bing. 88. But see *Lake v. King*, and *Kemp v. Gee*, *supra* 244, 245.

ament against the practice of empiricism, had laid himself open to a criticism on his composition which attempted to show that the petitioner's ignorance in his profession was manifest on the face of his own petition.

*The instances already cited, in illustration of the [*315] general principle, which makes the occasion operate as a defence, unless express malice be proved, are those where the occasion consists in the discharge of a duty of a public nature. The same principle it is next to be seen has an extensive application, where a party acts fairly and *bona fide* in the prosecution of his own or even another's interest.

It has been seen, that where a publication is made in the course of a judicial proceeding, no action for slander is maintainable, the very occasion furnishes an absolute defence. And where an application is made for the purpose of obtaining redress, though it be to a party who has no direct means of giving relief, yet, if the applicant may possibly obtain such relief indirectly, and he act *bona fide*, it seems that he is not liable to an action. In the case of the *King v. Bayley (a)*, the defendant had addressed a letter to General Willes, and the four principal officers of the Guards, to be by them

sponse to the inquiry by saying "there can be but one answer: *he is hired for the occasion.*" The defendant pleaded that the allegations in the publication were true, and that the publication was a correct report of proceedings in a legal court, together with a *fair* and *bona fide commentary* thereon. Replication *De injuria*. Lord DENMAN, C. J. told the jury that the principal question in the case was, whether the plaintiff was qualified to be a surety. If he was so qualified he was entitled to damages; if not, then *they were to say whether the comments which imputed to him that he was a hired swearer, and which would make him liable for a wilful false statement of facts, were comments*, and if they should think them *not fair* the plaintiff would be entitled to damages. The jury found for the defendant, and on a motion by the plaintiff for a new trial, the court, although of opinion that the comment was not a just inference from the facts stated in the libel, held that the question *had been correctly submitted to the jury*. The court in this case holding that when a comment raises an imputation of motives, which *may or may not be a just inference* from the preceding statement, it is a *distinct libel*, and the *propriety of the comment must be submitted to the jury*.

(a) 3 Bac. Ab. Libel, A. 2. cited by Best, J. 5 B. & A. 647.

presented to the king, stating that the prosecutor had obtained from him (the defendant,) a warrant for the payment of money due to him from the government under promise of paying the defendant such money, and that the prosecutor had received the money, and had not paid it over to the defendant. And the court [*316] *held that this was no libel, but a representation of an injury shown up in a proper way for redress,—yet neither the officers nor the king could give the defendant direct assistance in obtaining payment of the money wrongfully withheld (*b*).

So also in the case of *Fairman v. Ives* (*c*), it was held that a petition addressed by a creditor of an officer in the army, to the secretary at war, and complaining of unjust and unfair conduct, in respect of a debt due to the defendant from the plaintiff, and written for the purpose of procuring payment of the debt, through the interference of the secretary, was not libellous, the petition containing no more than a fair and honest statement of facts, in the apprehension of the defendant.

In the case of an ordinary action for slander of title, where the defendant claims no title for himself, but either denies the plaintiff's title, directly or impliedly, by asserting a title in another,—and where for anything that appears this is the mere wanton act of a stranger, there being nothing to explain his motive or conduct, it seems that the ordinary principle would prevail, and malice in law would result from the very act of the defendant, in doing that which was likely to occasion damage, in the absence of any circumstances which would furnish any legal justification or excuse ; [*317] *and therefore, the privilege which belongs to one who asserts his own claim, does not protect him in falsely asserting a title in a mere stranger. The defendant had said, " I know one who had two leases of his (the plaintiff's) land, who will not part with them at any reasonable rate." And it was held, that he could not justify, by showing that he meant to allege a title by two leases in himself (*d*). So it has been held, that if the defend-

(*b*) See the observations of Bayley, J. 5 B. & A. 647.

(*c*) 5 B. & A. 642.

(*d*) *Pennyman v. Rabanks*, Cro. Eliz. 427. Vin. Ab. 551. pl. 11.

ant say that J. S. has a better title to the land than the tenant in possession, but make no claim himself, an action lies (e)

Where the defendant in an action for slander of title, was not a mere wrongful intruder, but was connected in interest, though remotely, with the transaction, the question is, whether he acted *bonâ fide*, or with a malicious intention to injure the owner,—and this is properly a question of fact for the jury, under all the circumstances.

In the case of *Smith v. Spooner* (f), the action was brought for preventing the sale of lease-hold property, by the assignee of the lessee, against the owner of the property, who had declared at the time of putting up the property *for sale, that the plaintiff could make no title. It appeared, that the defend- [*318] ant was present when the lot was put up, and that he then told the auctioneer that it was of no use to sell it, as the house was his own; he was the landlord, and that no title could be made to it. On this, some persons who had intended to bid retired, and the defendant offered to purchase the lease, having also made a previous offer of the same kind. Previous to the trial, the defendant had obtained possession of the premises by an ejectment, and the plaintiff's attorney had tendered him five quarters' rent, and the costs of the ejectment, if he would deliver back the possession. The jury found a verdict for the plaintiff; but the court afterwards directed a nonsuit to be entered, on the ground that there was no evidence of express malice. But in a subsequent case (g), where the owner of a house had prevented the plaintiff, who held under a lease for years, from disposing of the remainder of his term, by falsely asserting that he had *no title*; the court, after a verdict for the plaintiff, refused a rule to show cause why there should not be a new trial. Lord Ellenborough, C. J. observing, that "The circumstances of *the defendant's title and interest, may rebut the implica- [*319] tion of malice; but here it was left to the jury, to say, whether there was malice or not."

(e) Jenk. 247.

(f) 3 Taunt. 246.

(g) *Smith v. Spooner*, K. B. Mich. 1811. Quære whether the parties were not the same as in the case of *Smith v. Spooner*, 3 Taunt. 246, in which a nonsuit was entered in the C. P. Mich. 1810.

Where the alleged slander of title was conveyed in a letter, to a person about to purchase the estate from the plaintiff, imputing insanity to Y. from whom the plaintiff purchased it, and stating that the title would therefore be disputed; in consequence of which, the person refused to complete the purchase; it appeared, that the defendant had married the sister of Y. who was heir apparent to her brother. And the court held, that under the circumstances, the defendant ought to have the free liberty of stating objections to the title, to the proposed purchaser, as in the case of *Gerard v. Dickenson and others*, which was not stronger than the present, though such a liberty was not allowed to a mere stranger, according to the rule in *Jenkins's Centuries*, immiscet rei se alienæ (*h*), but that it was impossible to treat the defendant as a stranger; for though he was indeed a stranger as to any vested interest, he had an interest, in probable expectation, so as to induce him to bestir himself and look about, lest an improper conveyance should be made injurious to his right. That the question distinctly and substantively [*320] was whether the defendant, in making the communication which he had made, had acted *bonâ fide*, believing it to be true (*i*).

An attorney to a creditor (*k*), who had previously committed an act of bankruptcy, stopt the sale of an estate previously mortgaged and assigned to the plaintiff, by declaring the creditor's bankruptcy, and that a docket had been made out for a commission; it turned out that an act of bankruptcy had been committed, but that no commission had been sued out. On action brought, it was held, that in order to support it, there should be proof of malice, either express or implied; that if the defendant acted *bonâ fide*, and told the truth

(*h*) 247. P. C. 36.

(*i*) *Pitt v. Donovan*, 1 M. & S. 639. The learned judge who tried the cause had stated to the jury, that if the evidence satisfied them as men of good sense and understanding, that Mr. Y. was insane, or if the defendant entertained a persuasion that he was insane, on such grounds as would have persuaded a man of sound sense and knowledge of business, then the defendant would be entitled to the verdict. The jury found for the plaintiff; but the court granted a new trial, on the ground that the question was not correctly left to the jury.

(*k*) *Hargreave v. Le Breton*, Burr. 2422.

he did no more than his duty; and though he went beyond what was strictly true, still, if there was no material variance, and no difference made with respect to the plaintiff's title, the action was not maintainable.

In general, where a communication is made in *confi- [*321] dence, either by or to a person interested in the communication, supposing it to be true, or by way of admonition or advice, it seems to be a general rule, that malice is essential to the maintenance of an action (l). [1]

So far has this principle been carried, that it has even been held that the publishing an advertisement in a newspaper, involving a suspicion that the plaintiff had been guilty of bigamy, yet being published *bonâ fide*, at the instance of one who was interested in the discovery, was not libellous (m).

(l) Vide *supra*, 217, 218.

(m) *Delany v. Jones*, 4 Esp. C. 191. The alleged libel was as follows : —

“TEN GUINEAS REWARD.

“Whereas, by a letter lately received from the West Indies, an event is stated to be announced by a newspaper that can only be investigated by these means :— This is to request, that if any printer or other person can ascertain that James Delany, Esq. (the plaintiff), some years since residing at Cork, late lieutenant in the North Lincoln Militia, was married previous to nine o'clock in the morning of the 10th of August, 1799, they will give notice to — Jones (the defendant), No. 14 Duke-Street, St. James's, and they shall receive the reward.”

Lord Ellenborough, in summing up to the jury, said, “that although that which is spoken or written may be injurious to the character of the party, yet, if done *bonâ fide*, as with a view of investigating a fact, in which the party making it is interested, it is not libellous. If, therefore, this investigation was set on foot, and this advertisement published by the plaintiff's wife, either from anxiety to know whether she was legally the wife of the plaintiff or whether he had another wife living when he married her, though that is done through the medium of imputing bigamy to the plaintiff, it is justifiable; but in such a case it is necessary for the defendant who published the libel, to show that he published it under such authority, and with such a view. The jury are, therefore, first to say, whether the advertisement imputes a charge of bigamy to the plaintiff, and if they think it does, then to inquire whether the libel was pub-

[1] See *Bradley v. Heath*, 12 Pick. 163.

[*322] *In an action (*n*) for a libel on the plaintiff, in his profession as a solicitor, the libel, as set out in the declaration, was contained in a letter written by the defendant to Messrs. Wright and Co. bankers at Nottingham, and charged the plaintiff with improper conduct in the management of their concerns. It appeared, however, upon the trial, that the letter was intended as a confidential communication to those gentlemen, and that the defendant himself was *interested* in the affairs which he supposed to be mismanaged by the plaintiff. After the cause had been opened by the plaintiff's counsel,

Lord Ellenborough, C. J. said, if the letter had been written by the defendant confidentially, and under an *impression*

[*323] *that its statements were *well founded*, he was clearly of opinion that no action could be maintained. It was impossible to say that the defendant had maliciously published a libel to aggrieve the plaintiff, if he was acting *bonâ fide* with a view to the *interests of himself* and the persons whom he addressed; and if a communication of this sort, which was not meant to go beyond those immediately *interested* in it, were the subject of an action for damages, it would be impossible for the affairs of mankind to be conducted. His Lordship referred to the case *Cleaver v. Sarraude*, tried on the northern circuit while he was at the bar: where, in an action like the present, it appeared that the letter had been written confidentially to the Bishop of Durham, who employed the plaintiff, as steward to his estates, to inform him of certain supposed malpractices on the part of the plaintiff; upon which the judge, who presided, declared himself of opinion that the action was not maintainable, as the defendant had been acting *bonâ fide*, and the *non-suit* which he directed, had been acquiesced in from a conviction entertained by the plaintiff's counsel of its being founded in law.

The Attorney-general, for the defendant, said, that his client, at lished with a view, by the wife, of fairly finding out a fact respecting her husband, in which she was materially interested. If it was so, the publication is not a libel, and the defendant is entitled to a verdict." The jury found a verdict for the defendant.

(*n*) *M'Dougall v. Glairidge*, 1 Camp. C. 267.

the time of writing the letter, was certainly impressed with a belief of the truth of the charges it contained, but had since seen *reason to believe they were groundless; he therefore consented to withdraw a juror. [*324]

So, where the person *to whom* the communication is made is interested, as in the case of *Cleaver v. Saraude*, above quoted, no action is maintainable without proof of express malice.

In the case of *Dunman v. Bigg (o)*, the plaintiff was a dealer in beer, buying it of a brewer, and selling it to publicans. Wishing to open an account with the defendant, a brewer, one Leigh became his surety for the price of such quantities of beer as should, from time to time, be supplied to him, the defendant promising to inform Leigh of any default in his payments made by the plaintiff.

After the parties had dealt together for some time, the defendant went to Leigh, and spoke to him in very opprobrious terms of the plaintiff, saying, that he wished to cheat him, that he had sent back as unmerchantable, beer which he himself had adulterated; that he was a rogue and a rascal, &c. At this period there was a sum of money due from the plaintiff to the defendant in respect of the beer, for which Leigh had given a guarantee. Lord Ellenborough, C. J. said, “ I am inclined to think that this was a privileged communication. Had the defendant gone to any *other man, and uttered these words of the plaintiff, they certainly [*325] would have been actionable; but Leigh, to whom they were addressed, was guarantee for the plaintiff, and the defendant had promised to acquaint him when any arrears were due. He therefore had a right to state to Leigh what he really thought of the plaintiff’s conduct in their mutual dealings; and even if the representations which he made were intemperate and unfounded, still, if he really believed them at the time, he cannot be said to have acted maliciously, and with an intent to defame the plaintiff. To be sure, he could not lawfully, under *colour and pretence* of a confidential communication, destroy the plaintiff’s character, and injure his credit, but it must have the most dangerous effects if the communications of business are to be beset with actions of slander. In this case

(o) *Sittings in London after T. T. 48 G. 3. Camp. R. 260.*

the defendant seems to have been betrayed by passion into some unwarrantable expressions; I will therefore not nonsuit the plaintiff, and it will be for the jury to say, whether these expressions were used with a malicious intention of defaming the plaintiff, or with good faith to communicate facts to the surety which he was interested to know (*p*) [1].

(*p*) The parties agreed to withdraw a juror.—For further illustrations of this division of the subject, see *R. v. Enes*, Andr. 229. Lord Mordington's case, *R. v. Jenneaur*, 3. Bac. Abr. 452, and *R. v. Bailey*, Andr. 229. So it was held that the owner of a public house could not maintain an action against a neighbouring publican, for giving a bad character of such house to a person who, being in treaty for purchasing it, applied to the defendant for information, provided (as is stated) there is some evidence, though slight of the truth of the assertion. *Humber v. Ainge*. Abbott, L. C. J. West. 13 Feb. 1819. Manning's Index, tit. Libel, pl. 13. In the case of *Wilson v. Stephenson*, 2 Price 282, where the defendant had stated that the plaintiff had murdered his, the plaintiff's brother, the plaintiff having, in fact, been the innocent occasion of his brother's death; and the defence was, that the words had been spoken in the way of admonition, and the jury found that the words were not spoken maliciously; which was recorded as a verdict for the defendant, the court refused to disturb the verdict. See further as to words spoken by way of admonition or advice. 2 Brownl. 151, 152. 2 Burn's Ecc. Law 179. 3 Bac. Ab. 412.

[1] To the illustrations given of this division of the subject, it is supposed that the case of *Prosser* and another *v. Bromage*, 4 Bain. & Cres. 247, referred to by the author in page 220 *supra*, might well have been added here as it settles a most important principle bearing upon the every day transactions of life. The plaintiffs were bankers and the charge was that in answer to a question put by one *Watkins* to the defendant, *whether he had said that the plaintiff's bank had stopped?* he had answered *it was true*; he had been told so; that it was so reported at C. and that no one would take their bills, and that he had come to town in consequence thereof. It was proved that C. D. had told the defendant that there was a run on the plaintiffs' bank at M. The defendant had a verdict, and a new trial was granted on the ground of the misdirection of the jury, but Bayley, J. who delivered the judgment of the court observed, "Had it been noticed to the jury *how* the defendant came to speak the words, and had it been left to them as a *previous question*, whether the defendant understood *Watkins* as asking for information for his own guidance, and that the defendant spoke what he did to *Watkins*, merely by way of honest advice to regulate his conduct, the question of *malice* in fact would have been proper as a *second question* to the jury, if their minds were in favor of the defendant upon the first." See also *Pasley v. Freeman*, 3 T. R. 51, and *Van Spike v. Cleyson*, Cro. Eliz. 541.

*It must, however, be remarked, that in all these [*326] cases, where the occasion is sufficient to raise the question of actual malice, the doctrine must be understood with this limitation, viz. that the times and mode of the publication are suited to the occasion. For it seems to be clear, that whether the occasion and circumstances supply an absolute or merely a qualified justification, dependent on the question of actual malice, they do not extend to justify any publication which is not warranted by the occasion and circumstances. *In the instance of a brief [*327] to counsel, for instance, the publication as between the attorney and counsel may not be libellous, and yet, were it to be printed and published, there might be a libel in every line. Where the defendant who had acted as solicitor to a commission against Brown, upon a petition to the chancellor to supersede the commis-

So an action will not lie for slanderous words, *oral* or *written*, where one member of a church imputes to another member of the same church the commission of a crime, if the words be spoken or written *in the course of church discipline*, and it be not proved that the defendant in making the charge was actuated by *express malice*. *Jarvis v. Hatheway*, 3 Johns. R. 180 ; *O'Donoghue v. McGovern*, 23 Wendell 26.

In conclusion upon this point, "the law" as is well observed in Holt's N. P. 299, in a note to *Wyatt v. Gore*, "respects communications made in confidence, notwithstanding they may be *false* and *erroneous* and prove injurious to the party. This rule or rather limitation with respect to the general law of libel, applies equally to words written and spoken. It is meant to protect the communications of business and the necessary confidence of man in man. But if the communication be *malicious* as well as *false*, and under the cloak of confidence be meant to defame, it is no longer within the protection of the rule. The law not only extends this exemption to the confidential communications of friendship, but to all such charges as necessarily exclude the suspicion of malice, *Weatherstone v. Hawkins*, 1 T. R. 110 ; *Dunman v. Bigg*, 1 Camp. R. 269 ; *Rex v. Hart*, 1 Wm. Black. 386 ; 2 Burns' Ecc. Law, 779. Under communications of friendship are included those of man to man in the aid of business, duty, public or private functions, security of property, or of the morals or manners of his family : in a word, every communication *the object of which is to assist one man without injuring another*, and to discharge the offices of a man, a citizen and christian. The law of libel in this respect, only repeats and confirms the law of moral duty ; and in any doubt on this head, it may always lead us to a safe conclusion in law, to inquire simply what was our duty as to the point in dispute, in morality." See also note [1], page 246, *supra*.

sion, published an address to the creditors in a public newspaper, charging the bankrupt with having committed a gross fraud against his creditors, and calling on the latter to resist the proceedings, Lord Ellenborough held that as the communication might have been made in a manner less injurious, it was to that extent libellous (*q*).

(*q*) *Brown v. Croome*, 2 Starkie's C. 297. His lordship observed, that if the publication in question had merely suggested doubts, without alleging the facts as in the case of *Delaney v. Jones*, the main grievance would have been wanting. If it could be shewn, that an advertisement in the Gloucester paper was the only possible means of communicating notice of the circumstances, it might be sufficient to vindicate the mode; one person could have no right to take measures for his own benefit to the injury of another. The argument which had been used was ingenious, but the defendant made no progress in his defence, unless he could shew that such a publication was the only effectual mode of convening the creditors. The want of proper caution had rendered the publication, actionable, as being published to the world at large; this made an essential distinction, which applied to all the cases; in the instance of a brief to counsel for instance, the publication as between the attorney and counsel might not be libellous, and yet if it were to be printed and published, there might be a libel in every line. Every unauthorized publication, to the detriment of another was, in point of law, to be considered as malicious.

CHAPTER XIV.

REPETITION OF SLANDER INVENTED BY ANOTHER.

*THE doctrine of justification, on the ground that the [*329] defendant has done no more than repeat the scandal which he has heard from another, though of ancient date, rests on principles so dubious and has been so limited in its modern application, that it seems to be doubtful whether in any case such a justification would be permitted to prevail as an absolute and peremptory defence without reference to other circumstances, and the actual intention of the publisher [1].

And for this reason it has been deemed to be more proper to rank this species of defence with those which are of a qualified nature, and which depend, for their consummation, on the absence of express malice, than to class it with those where the very occasion and circumstances furnish an absolute and peremptory bar, independently of the question of intention.

The doctrine of justification by hearsay was expressly recognized in Lord Northampton's *case (*a*), which was [*330] upon an information in the Star Chamber, for scandalum magnatum. The resolution contained in that case, has a plain reference to the rule contained in the statute 1 Westminster, which enacts, that the propagator of slander, concerning the grantees of

[1] See note 1, page 340, *infra*.

(*a*) 12 Rep.

the realm, shall be imprisoned *until he give up the author*. The resolution was, “if A. say to B. ‘did you not hear that C. was guilty of treason?’” This is tantamount to a scandalous publication. And, in a private action for slander of a common person, if J. S. publish that he hath heard J. N. say, that J. G. was a traitor or thief, in an action on the case, if the truth be so, he may justify: but if J. S. publish that he hath heard generally, *without a certain author*, that J. G. was a traitor or thief, there an action *sur le case* lieth against J. S. for this, that he hath not given to the party grieved any cause of action against any, but against himself, who published the words, although that in truth he might hear them, for otherwise this might tend to the great slander of an innocent person; for, if one who hath *læsam phantasiam*,² or who is a drunkard, or of no estimation, speak scandalous words, if it should be lawful for a man of credit to repeat them generally, without mentioning the

[*331] author, *that would give greater color and probability that they were true, in respect of the credit of the repeater, than if the author himself should be mentioned (*b*).’”

In *Crawford v. Middleton* (*c*), it was held, that it was necessary for the plaintiff to negative the fact of the defendant’s having heard the words, which he pretended to repeat as spoken by another. But in the case of *Woolnoth v. Meadows* (*d*), where a similar objection was taken, it was said by the court, that Lord Northampton’s case was a complete answer to it.

As the consideration of the indemnity consists in the giving the plaintiff a certain cause of action against the author, or at least against a prior propagator of the slander, if the disclosure made fall short of supplying a certain cause of action, it will not avail as a justification.

The defendant (*e*) speaking to the plaintiff, who was a tailor, said, “I heard you were run away.” The defendant pleaded, that before the speaking of the words, he had heard and been told, by one

(*b*) The court referred to 34 and 35 Ed. 1, and 30 Ass. pl. 10. in the Exchequer. Mich. 18 Ed. 1. Rot. 4.

(*c*) 1 Lev. 82.

(*d*) 5 East, 463.

(*e*) *Davis v. Lewis*, 7 T. R. 17.

D. Morris, that the plaintiff had run away, for which reason he spoke the words.

*Lord Keyon, C. J. in giving judgment for the plaintiff on demurrer, said, “ Whether this be considered on the authorities, or on the reason of the case, the justification cannot be supported. The Earl of Northampton’s case is precisely in point. If a person say, that such a particular man, naming him, told him a certain slander, and that man, in fact, did tell him so, it is a good defence to an action to be brought by the person of whom the slander was spoken ; but if he assert that slander generally, and without adding who told him, it is actionable. Then it is said, it is sufficient to repel such action, to disclose, by the defendant’s plea, the person who told him that slander ; but that is clearly no justification ; after putting the plaintiff to the expense of bringing the action, he can only impute the slander to the person who utters it, if the latter do not mention the person from whom he heard it. The justice of the case also falls in with the decisions on the subject. It is just, that when a person repeats any slander against another, he should, at the same time, declare from whom he heard it, in order that the party injured may sue the author of the slander.

So (*f*), where the defendant said of the plaintiff, who had been proposed as a volunteer for *the defence of the [*333] country, “ His (the plaintiff’s) character is infamous ; he would be disgraceful to any society. Whoever proposed him must have intended it as an insult. I will pursue him, and hunt him from all society. If his name is enrolled in the Royal Academy, I will cause it to be erased, and will not leave a stone unturned to publish his shame and infamy. Delicacy forbids me from bringing a direct charge, but it was a male child of nine years old who complained to me.” The defendant justified, averring that a male child of the name of A. B., of the age stated, did complain to the defendant of an unnatural crime before that time committed by the plaintiff upon such male child. Upon demurrer, it was observed by the court, that slanderous words can in no case be justified upon the report of another, unless the name of the original slanderer be given

(*f*) *Woolnoth v. Meadows*, 5 East. 463.

at the time ; that it is not sufficient to disclose the name for the first time in the defendant's plea ; that the object of the rule is to give the injured person *a certain cause of action against some one*. But that, in the principal case, no action could have been maintained on those words against the boy ; whereas, if the defendant had named the boy at the time, and repeated truly what he had said to him, the plaintiff would have had his action against the boy.

[*334] *And for the same reason, the repeater of slander must give the very words used by the author ; for the plaintiff, to maintain his action, must state the very words used by the defendant, and prove them as stated ; so that unless the defendant faithfully repeat the original slander, the plaintiff will not be put in possession of a certain cause of action.

The defendant (*g*), in a written affidavit, deposed to words spoken by a third person concerning the plaintiffs, who were merchants ; and, after stating the words used by the third person, added, “ or words to that purport and effect.” The defendants justified, stating, that they did hear the third person publicly declare to the effect following ; and then proceeded to state the communication deposed to, on which the action had been brought. To this justification the plaintiff demurred upon several grounds ; and the court, in giving judgment for the plaintiffs, observed, that “ at all events, in order to justify the parties reviving the slander by naming the original author of it, they must so disclose the matter as to give the plaintiff a certain cause of action against the party named. Now here they only state that the other uttered such words, or *to that effect* ; and if the defendants, when called as witnesses to support the action against the author, could only prove that he

[*335] *uttered words to *the effect* of those set forth, that would not be sufficient.

In Maitland and others (*i*) against Goldney and others, one ground of the plaintiff's action, as stated in the declaration, was, that the defendants had published the slander of another, well knowing that other to have retracted his opinion of the plaintiffs, and to have confessed his error. Upon demurrer, it was not argued for

the defendants that an action does not lie for publishing slander originally uttered by another, after knowledge by the defendant that it was untrue, but an objection was taken to the mode of pleading.

In giving judgment on demurrer, it was observed by Lord Ellenborough, C. J. that "In order to maintain this species of action, it is necessary that there should be *malice* in the defendant, and an *injury* to the plaintiff, and that the words should be untrue. By the first count, the charge in substance against the defendants is, that they revived and published an injurious report of the plaintiff which had been made by another person, who was afterwards convinced that he had uttered the words hastily and rashly, and that the defendants did this with a full knowledge of all those circumstances. All the several allegations of the previous reports, the subsequent *explanation of the plaintiff's [*336] conduct to Guy (*k*), his satisfaction with it, and the defendant's knowledge of it, are so interwoven by the pleading with the publication of the libel, that they could not be severed from it; so that the plaintiffs could not sustain that count by proof of the publication alone, without such explanatory circumstances. The plaintiffs could not entitle themselves to recover unless all were proved. The count then contains a charge against the defendants, that they published the slander with a *knowledge* that the person who had originally uttered it was satisfied that it was untrue. The fact, therefore, of such previous uttering, was merely used by the defendants as a *pretence* for publishing the same slander; that shews *malice* in the defendants, and an injury to the plaintiffs." Judgment was, however, given for the plaintiffs, not on the ground of legal malice being attributable to the defendants, but because they had repeated the *effect of the slander*, and not the very words.

In the case of *Gerrard v. Dickenson* (*l*), it was held, that slander spoken by the defendant against his own knowledge, made him liable at all events, and deprived him of the benefit of his justification.

In the case of *M'Gregor v. Thwaites* (*m*), it *was [*337] held, that where offensive but not actionable words,

(*k*) The author of the slander. (*l*) 4 Coke 18. b. (*m*) 3 B. and C. 24.

spoken by one person, were written and then published by another, it was no defence to an action against the latter for a libel, that the publication revealed the name of the author, for as the original words were not actionable, as spoken, the defendant had not afforded the plaintiff any cause of action against any other person ; and, therefore, as the words, when reduced to writing, were clearly libellous and actionable, and no action could be maintained against any one but the defendant, he was necessarily responsible.

And in the case of *Lewis v. Walter* (n), the defendant pleaded that the alleged libel was originally published in the Hants Journal by S. H. M. and W. H. ; that the defendant, at the time of his publishing the alleged libel, did also publish that the supposed libellous matter was copied and quoted from the said last mentioned public paper (The Hants Journal), and that the said S. H. M. and W. H., had made and delivered an affidavit, pursuant to the statute, making oath that they were the publishers of the last mentioned paper. This plea was held to be bad (on demurrer) on the ground that the defendant had not disclosed the names of the publishers of the original paper at the time when he published the libel.

*And it was held that, admitting that such a defence [*338] could be pleaded in bar at all, it could only be in a case where the defendant had originally given up the author by name, and where the name is sufficient to identify the party. The court, however, intimated considerable doubts whether Lord Northampton's case extended to justify any repetition of slander, except on a fair and reasonable occasion.

Although it be true that the principal authority for the doctrine of justification by hearsay, is the extra-judicial resolution in Lord Northampton's case, yet the statutes of scandalum magnatum afford a strong reason for supposing that this was once the general law of the land. Those statutes have been regarded as declaratory of the common law, and it seems to be clear, from their language, that in all cases within their scope, the propagator of scandalum magnatum, was to be imprisoned no longer than until he should have discovered the author of the scandal (o). Now, if such were the law,

(n) 4 B. and A. 605.

(o) Supra, 176.

even where the slander affected men of the highest rank and dignity in the realm, it is not very easy to suppose that a stricter rule would be applied where the slander affected subjects of inferior degree and consequence.

*If the question be still open to consideration, there can be little doubt in what way it ought to be decided in [*339] point of principle.

It is difficult to carry the doctrine of exculpation from hearsay further than this, that one who *bona fide* repeats scandal, which he has heard from the mouth of another, for the purpose of enabling an innocent party who has been calumniated, to take measures for redressing the grievance, shall not be liable to an action. It is obvious, that if a man malevolently give a wide circulation to slander, under the mere colour and pretence of rendering friendly aid and assistance to the party calumniated, he stands in no situation which entitles him to legal protection ; and consequently, as the act is in its own nature injurious, there is nothing to exempt him from the ordinary rule, which obliges the propagator of a scandalous report, attended with actual or presumptive damage, to make compensation (*p*).

Were such a justification to be an absolute and peremptory bar to the action, it might be in the power of any two ill-disposed persons to slander a third with impunity. If A. were to impute felony or any other crime to M., in the presence of B., and B. were to impute the same offence to *M. in the presence [*340] of A., and each were then to publish generally that he had heard such slander reported by the other, M. would be without remedy against either ; if he brought his action against A., then A. would prove, that he did in fact hear the charge from B.; if he sued B. a similar defence would also succeed [1].

(*p*) See Mr. Borthwick's Observations, Law of Libel, p. 291, 297.

[1] It is undeniable that at the time of the publication of the second English edition of this work (i. e. in 1830), it was and still is the law of England, that an action will not lie against a party for *oral slander*, if *at the time of speaking* the words, he gives the *name of the author* of the slanderous charge. This is manifest from the cases of *Davis v. Lewis*, 7 T. R. 17, and *Maitland v. Goldney*, 2 East. 426, and indeed, from the purport of this whole chapter, although the

learned author struggled hard to give a different complexion to the subject. The rule, as it prevailed in England, was adopted in its full extent in *South-Carolina*, in the case of *Miller v. Kerr*, 2 McCord's R. 285. In *Pennsylvania* it was at first held that *giving up the author* was *prima facie* a good defence; but allowing the presumption of innocence to be rebutted by proof of malice, *Binns v. McCorkle*, 2 P. A. Brown's R. 79, and *Hersh v. Ringwalt*, 3 Yeates 508. This doctrine was subsequently modified in that state, by allowing the defendant *in mitigation of damages* to prove that what he had uttered, he had been told by another, although the author of the slander was not named at the time of the speaking of the words, *Kennedy v. Gregory*, 1 Binney 85, and by permitting it to be proved that the defendant had not devised the slander, but that it was found among the papers of his predecessor in a printing establishment, *Morris v. Duane*, 1 Binney 90, n. In *Connecticut* it was held when the question first arose there, that giving the name of the author at the time of the speaking of the words was available *in mitigation of damages*, *Leister v. Smith*, 2 Root 24; but subsequently it was held that such evidence ought not to be received, even *in mitigation*, *Austin v. Hanchett*, 2 Root 148; and *Treat v. Browning and wife*, 4 Conn. R. 408.

In 1813, the case of *Dole v. Lyon*, 10 Johns. R. 447, came before the supreme court of the state of New-York for adjudication. It was an action for a *libel* published by the defendant, in which he *gave the name of the author*, viz. one G. D. Young. The plaintiff recovered a verdict, and the defendant asked for a new trial, on the ground among others, that having given the name of the author, he was not liable to an action. Chief Justice KENT pronounced the judgment of the court. After adverting to the rule laid down in the *Earl of Northampton's case*, 12 Co. 132, and in *Davis v. Lewis*, 7 T. R. 17, he observed that in neither of those cases was that rule the point in judgment, and proceeded, "It may well be questioned whether this rule, even as to *slandorous words*, ought not to depend upon the *quo animo* with which the words with the name of the author are repeated. Words of slander, with the name of the author, may be repeated with a malicious intent, and with mischievous effect. The public may be ignorant of the worthlessness of the original author, and may be led to attach credit to his name and slander, when both are mentioned by a person of undoubted reputation. *There is however a distinction between ORAL and WRITTEN or PRINTED SLANDER*, which is noticed in all the books; and the latter is deemed much more pernicious, and will not so easily admit of justification. *There is no precedent of such a justification in an action for a libel*. He concludes his opinion upon this part of the case in these words: "Individual character must be protected, or social happiness and domestic peace are destroyed. It is not sufficient that the printer, by naming the author gives the party grieved an action against him. This reason of the rule is mentioned in *Lord Northampton's case*, and repeated by *Lord Kenyon*. But this remedy may afford no consolation and no relief to the injured party. The author may be

some vagrant individual, who may easily elude process ; and if found, he may be without property to remunerate in damages. It would be no check on a libellous printer who can spread the calumny with ease and rapidity throughout the community. The calumny of the author would fall harmless to the ground, without the aid of the printer. The injury is inflicted by the press, which like other powerful engines, is mighty for mischief as well as for good. I am satisfied that the proposition contended for on the part of the defendant, is as destitute of foundation in law, as it is repugnant to principles of public policy." A new trial was denied. This case may be considered as having settled the law in New-York, that giving the *name of the author* is no bar to any action for the re-publication of a *libel*; and in the subsequent cases of *Mapes v. Weeks*, 4 Wendell 659, and *Inman v. Foster*, 8 Id. 602, it was adjudged in the same state that evidence that the defendant *had been told by another* what he had uttered against the plaintiff was inadmissible as well in *mitigation* of damages as in bar of a recovery. In 1803, the supreme court of Pennsylvania, in *Runkle v. Meyer*, 3 Yeates 518, advanced the doctrine subsequently held in *Dole v. Lyon*, that giving the name of the author of a *libel* was no justification ; but added that the evidence was admissible in mitigation of damages.

In 1821, Lord C. J. ABBOTT and BEST, J. in the case of *Lewis v. Walter*, 4 Barn. and Ald 611, expressed their doubts whether the resolution contained in the *Earl of Northampton's case*, was applicable to *written* slander. HOLROYD J. insisted that even in respect to *oral slander*, a defendant under the rule in the *Earl of Northampton's case* was not justifiable, unless the words were spoken, (in repetition) on a *fair and justifiable occasion* : in which opinion BEST, J. concurred, observing that it was justifiable to repeat the slander only when done for some *fair and reasonable cause* : thus assenting in 1821, to the doctrine laid down by Chief Justice Kent in 1813. In 1829, however, the question as to this defence in case of *written slander*, was fully settled in the King's Bench in *De Crespigny v. Wellesly*, 5 Bingham 392. To a declaration for a *libel*, the defendant pleaded that the matter alleged as libellous, was delivered to him in a *written statement* by a third person, and that at the time of the publication, he gave the name of such person. The plaintiff demurred. BEST, then Chief Justice, delivered the opinion of the court, *that such a justification cannot be pleaded to an action for the republication of a libel* ; and at the same time entered a *protestando* in behalf of the court, against being considered as admitting that even in *oral slander*, a party may plead that what he had related had been told to him by a third person, and that at the time of speaking the words he named such third person.

CHAPTER XV.

OF THE PROCESS AND PLEADINGS.

[*341] *NEXT are to be considered the means appointed by law for obtaining such damages where the party is entitled to them; and the means of defence where a party sues who is not so entitled.

The division of these proceedings is naturally suggested by the order in which they occur in point of time, and consist of the process, pleadings, trial, judgment, and writs of error; to which may be added, the writ of prohibition.

OF THE PROCESS.

The action to recover damages for slander, whether oral or written, is an action on the case; in which, since the damages are uncertain, the party cannot be held to bail without a special order of the court, or of a judge, on a full affidavit of the circumstances (*a*), and no instance appears in the books in which such an order, in a common case, has been granted. Even in an action of

[*342] scandalum magnatum, the *court has denied an application for good bail; in the Marquis of Dorchester's case (*b*) the defendant agreed to put in bail to the amount of £50.

In the Earl of Macclesfield's case (*c*), the plaintiff desired that the defendant might put in special bail; but the court could not

(*a*) 1 Tidd. P. 150. ed. 4.

(*b*) 2 Mod. 215.

(*c*) 3 Mod. 41.

grant it, and said, it was a discretionary thing, and not to be demanded of right [1].

And it seems that the court will, in no case, allow special bail, unless affidavit be made of the words spoken (*d*).

It is next to be considered what there is peculiar to the pleadings in an action for slander: Observations upon the declaration relate to the venue, the parties, the averments, and the joinder of different counts.

FIRST, TO THE VENUE.

In general, the venue in an action of this nature may be changed upon the usual affidavit, where that affidavit can be made with propriety. But where (*e*) a libel, written or printed in one county, is circulated in others, the court will not change the venue to the first; for, as every publication is a fresh offence, the defendant *cannot swear that the cause of action was confined to [*343] any one county (*f*).

But where a libel is written in one place, and sent to another in the same county, the court will change the venue (*g*) if it be laid in a different county [2].

(*d*) 3 Mod. 41.

(*e*) *Hoskins v. Ridgway*, H. 23 G. 3. K. B. *Pinkney v. Collins*, 1 T. R. 571. 1 Wils. 178. 1 T. R. 647.

(*f*) *Clissold v. Clissold*, 1 T. R. 647. 1 Wils. 178. The court refused to change the venue from London to Worcester, an affidavit being made that the letter was written at Stafford, because it bore the post-mark of that place; the putting the letter into the post-office, at Stafford, being *prima facie* evidence that it was written there. *Hitchon v. Best*, 1 B. & B. 299.

(*g*) *Freeman v. Norris*, 3 T. R. 306.

[1] In *Clason v. Gould*, 2 Caines R. 47, the defendant who had been arrested in an action for a *libel* in which a judge's order to hold to bail had been obtained, was discharged on the ground that the affidavit to hold to bail did not show any *special cause* to justify the order; which the court said must be done to entitle the plaintiff in such action to hold to bail. In *Van Vechten v. Hopkins*, 2 Johns. 293, it was held sufficient to hold the defendant to bail that he was a *transient person*, residing out of the state, and a motion for his discharge was accordingly denied.

[1] In New-York, actions of slander, written and unwritten, are directed by statute, 2 R. S. 409, § 2, to be tried in the county where the *venue* is laid, unless

So, where the libel is written in one county and published in Germany, the defendant may change the venue, upon an affidavit that the cause of action arose in that county, and not elsewhere in this kingdom (*h*).

And in the case of *Freeman v. Norris* (*i*), the distinction was recognized between libels dispersed throughout the kingdom and those which are published in one county only.

So that, where the libel is printed in one county and published in a second, the venue, if laid in the second, cannot be changed; for the publication in the latter county, is the act of the defendant, and he cannot make the usual affidavit (*j*).

But the court will otherwise change the venue where special ground is laid.

[*344] *As if the defendant cannot have a fair trial in the original county (*k*).

But in an action for scandalum magnatum, it seems the venue cannot be changed upon the usual affidavit; and the reason assigned is, that the scandal raised of a peer of the realm reflects upon him throughout the kingdom (*l*).

In the case of Lord Shaftesbury above alluded to, the venue was changed on the ground that the defendant could not have a fair trial in London, where the venue is laid.

In the Marquis of Dorchester's case (*m*), on a motion to change the venue, which had been laid in London, Pemberton, Serj. shewed cause against the motion.

1st. Because the king was a party to the suit; for it is,

2ndly. Because the plaintiff was a lord of parliament, where his services would be required. North, C. J. was of opinion that the venue could not be changed, as the proceeding was in the nature of an information. But Atkins, J. inclined to think that the venue

the court deem it necessary for the convenience of parties and their witnesses, or for the purposes of a fair and impartial trial, to order the actions tried in some other county.

(*h*) 3 T. R. 652. *Metcalf v. Markham*.

(*i*) 3 T. R. 306.

(*j*) *Hitchon v. Best*, 1 B. & B. 299.

(*k*) *Lord Shaftesbury's case*, 1 Vent. 364.

(*l*) *Gil. C. P.* 90.

(*m*) 2 Mod. 216.

might be changed ; but the court not agreeing, the defendant consented that the cause should be tried in London, and the venue was not changed.

*But it seems that generally, unless special ground [*345] be laid for changing it, the plaintiff in *scandalum magnatum* may retain his venue (*n*).

Formerly, in actions for slander as well as in others, where a local justification was pleaded, the courts observed great nicety in requiring the venire to be awarded, not only from the county, but the very place which the justification, as stated in the plea, arose. The reasons for this were, indeed, frequently stronger in these actions than in other instances, since where the truth of a criminal charge is pleaded in justification, the issue partakes of the nature of a criminal process ; and it is said, that upon its being found against the plaintiff, he is liable to be tried by a petty jury without further inquest.

In the case of *Ford v. Brooke* (*o*), which was an action for calling the plaintiff a perjured person at D. in Essex ; the defendant justified, averring that the defendant had perjured himself at Westminster, in the county of Middlesex ; the plaintiff replied, *de injuria*, &c. and the court awarded the venire to be directed to the sheriff of Middlesex.

So, in an action for calling the plaintiff a thief, at Dale, in Essex, the defendant pleaded that the plaintiff had committed a robbery at Sale, in the *same county ; and issue being [*346] joined upon that fact, the court awarded the venire from Sale (*p*). And a misdirection of the venire was a good ground for arresting or setting aside the judgment, though the court would, in such case, award a new venire. But the law upon this point is altered by the statutes 16 & 17 C. 2. c. 8. and 4 Ann. c. 16. s. 6 ; the former of which enacts that, after verdict, no judgment shall be arrested or reversed, for that there is no right venue, so as the cause of action were tried by a jury of the proper county or place

(*n*) *Duke of Norfolk v. Anderton*, 2 Salk. 668. 1 Lev. 56. 307. 1 Vent. 364.

(*o*) *Cro. Eliz.* 261.

(*p*) *Clerk v. James*, *Cro. Eliz.* 870. See also *Bowyer's case*, *Cro. Eliz.*

where the action was laid : and the latter directs that the venire shall be awarded out of the body of the county where such issue is triable (*q*).

In *Craft v. Boite* (*r*), the words were, "Look, there is a thievish young rogue, he hath stolen £200. worth of plate out of Wadham College," (meaning Wadham College, in the University of Oxford). The plaintiff brought his action in London ; the defendant justified the words, because he said that the plaintiff at Oxford, in the county of Oxford, stole certain plate out of Wadham College ; the plaintiff pleaded *de injuriâ* &c. ; and the issue was tried in London, where the plaintiff had a verdict with £50 damages.

[*347] *Saunders, for the plaintiff, moved in arrest of judgment, on the ground of the mistrial, but the court (against the opinion of Twisd n) conceived that the fault was cured by the statute which was lately passed (*s*). And this, which appears to have been the first decision under the act, has since been acquiesced in.

NEXT, AS TO THE PARTIES.

First as to the number of plaintiffs. In this species of action, as well as in other cases of tort, two or more may join where their joint interest has been affected by the act of the defendant (*t*). So that, where a libel reflects upon two partners in their trade, they may join in the action (*u*) [*a a*]. But unless a joint interest be affected, several actions should be brought, though the same words be spoken or libel published concerning two [1]. Thus,

(*q*) See Serj. William's note, 2 Saund. 5.

(*r*) 1 Saund. 241.

(*s*) 16 & 17 C. 2.

(*t*) *Weller v. Baker*, 2 Wils. 423. 2 Williams' Saund. 116. a. n. 2.

(*u*) *Maitland v. Goldney*, 2 East. 425. 3 Bos. and Pull. 150. *Cook v. Batchelor*, Shepp. Ac. 53. *Foster v. Lawson*, 3 Bingh. 452.

[*a a*] An allegation that words were spoken concerning three plaintiffs, (partners) in their joint trade, is not supported by proof that they were addressed to one of them personally. *Solomons v. Medex*, 1 Starkie's C. 191.

[1] In *Sumner v. Buel*, 12 Johns. R. 475, it was held by a majority of the

where A. says to B. and C., "You have murdered D.," B and C. must bring several actions, not a joint one (x). So it seems, *that two joint-tenants or coparceners may [*348] join in an action of slander of their title to the estate: for as it must be shewn in the declaration, and proved, that the plaintiffs received some particular damage, by reason of the slander, the damage, even as well as their interest in the estate, is joint (y).

So, for the words A. or B. murdered D., either A. or B. may bring a separate action (z), but they cannot maintain a joint

judges of the Supreme Court of New-York, that for the publication of a libel against the officers of three companies of a regiment of militia called into public service, an action would not lie at the suit of one of those officers, unless *special damage* was alleged and proved. Chief Justice THOMPSON held that when the libel has no *particular* and *personal application* and is so general that no individual damage can be presumed, and the class or individuals so numerous to whom it would apply, that great vexation and oppression might grow out of a multiplicity of suits, *no private suit* can be sustained; but the offender must be proceeded against by *indictment*. SPENCER and YATES, justices, concurred. VAN NESS, J. dissented and delivered an opinion, in which PLATT, J. concurred. The doctrine of *Sumner v. Buel*, was called in question in *Ryckman v. Delavan*, 17 Wendell 52, which was an action for a libel affecting the business of the plaintiff as a brewer of beer. The libel charged that *certain malting establishments on the hill in Albany*, were supplied with water from stagnant pools, gutters and ditches for the purpose of carrying on the business of malting, &c. The plaintiff averred that *he* had a *malting establishment on the hill*, &c. and that to injure *him* the publication was made. The defendant demurred, and the Supreme Court upon the strength of the decision of *Sumner v. Buel*, held that the action did not lie: which judgment was reserved by the *Court for the Correction of errors*. See 23 Wendell 186; the latter court holding that an action for a libel may be sustained by an individual for an injury to his business resulting from a libellous publication, *although it affect the business of others* engaged in the same calling, unless it be manifest upon the face of the publication that the charges are against a *class of society, a profession, an order, or body of men*; and *cannot, by possibility, import a personal application* tending to private injury.

(x) *Smith v. Croker*, Cro. Car. 512. 28 H. 8. fol. 19. Dyer, Shepp. Ac. 53. Deacon's case.

(y) 2 Will. Saund. 117. a. (z) 10 Mod. 198.

one (a). Where (b) joint actionable words are spoken of a husband and wife, the tort is several, and the husband alone may bring the action; but the wife may, in such case, be joined, provided the injury be laid as done to herself [1].

The case of words spoken of the wife admits of three varieties;

1st. Where the words are not actionable, but are attended with special damage.

2dly. Actionable *without* special damage.

3dly. Actionable *with* special damage.

In the first case, the damage resulting to the husband is the sole ground of action, and the wife must *not* be joined. As, where the action is brought for calling the wife a bawd, *per quod* *the husband lost his customers (c). And to join the wife in such [*349] case would be bad on demurrer, in arrest of judgment, or in error (d).

But secondly, where the words are actionable, and no special damage is laid, the wife *must* be joined, and the declaration must conclude *ad damnum ipsorum*, for there the action survives; and she must be joined (e) in an action for any slander published of her before her marriage [2].

(a) 1 Roll. Abr. 81.

(b) *Smith v. Croker*, Cro. Car. 512.

(c) 1 Lew. 140. B. N. P. 7.

(d) *Grove v. Hart*, Tr. 35 G. 2. B. N. P. 7.

(e) 3 T. R. 627. 631. Com. Dig. Bar. and Fem. 1 Sid. 387. Ld. Ray. 1208. Roll. Ab. 347.

[1] See *Ebersoll v. King and wife*, 3 Binney 555, where it is held the slander of husband *and* wife, cannot be joined in the same action.

[2] An action for words *not* actionable *per se*, spoken of the *wife* alleging *special damage*, must be brought in the name of the *husband alone*; but for words actionable in themselves, spoken of her, the action must be in the names of the *husband and wife*, although they live apart under articles of separation, *Beach and wife v. Ranney and wife*, 2 Hill 309. Where, however, an action was brought by the wife living apart from her husband under articles of separation, *in the names of her husband and herself*, for slanderous words spoken of her, it was held that a *release* of the cause of action executed by the husband, was a good bar to the suit, notwithstanding that in the articles, the husband had covenanted that suits might be brought in their *joint names*, for any injury to the person, or character, &c. of the wife. *Beach and wife v. Beach and wife*, 2 Hill 260.

But thirdly, where the words spoken of the wife are actionable, and special damage has accrued in consequence to the husband, great perplexity has arisen on the question whether the wife should be joined or omitted. The difficulty, in this case, proceeds from the circumstance of two distinct causes of action being involved in one and the same transaction,—the actionable words spoken of the wife, and the special damage resulting to the husband. For the former, the husband is not entitled to damages without making his wife a party, and the cause of action survives to her. In the latter case, the loss is several, and peculiar to the husband, and ought not, therefore, to be stated as the loss of both. Accordingly, where the husband has brought the *action alone, it has been contended that he ought to have joined his wife in respect of the [*350] actionable words spoken of her, that at all events the action would survive to her, and therefore that the defendant would twice make compensation for the same injury. And in similar cases, when the wife has been joined, it has been argued that the joint action was improper, since the special damage accrued.

From a review of the decisions upon this point, it appears, that the wife *is not barred* by the husband's action, though the special damage result from actionable words spoken of the wife, which removes the objection to a separate action, in which he alone is entitled to recover damages. In *Guy v. Livesay (f)*, the husband alone recovered in an action of trespass for a personal injury to himself, and also for beating his wife, by means of which he lost her society for three days. And on motion in arrest of judgment, the court held, that the action was well brought; for the action was not brought *in respect of the harm done to the feme*, but for the particular loss of the husband, for that he lost the company of his wife, which was only a damage and loss to himself, for which he should have the action, as the master should have for the loss of his servant's service.

*In *Young v. Pridd (g)*, the plaintiff brought trespass [*351] for that the defendant assaulted, ill treated, and carried away his wife, and detained her for half a year, by means of which he lost the comfort and society which he should otherwise have had

(f) Cro. Jac. 501.

(g) Cro. Car. 89.

with his said wife. After verdict and judgment for the plaintiff, error was brought in the Exchequer Chamber, and assigned that the husband had brought the action for the battery of the wife, which he could not do without his wife, and had recovered damages for the battery, and therefore that the judgment was erroneous. But all the justices and barons held, that the husband in that action *did not recover damages for the battery* of his wife, but for the loss which he had in wanting her company. That the *per quod consortium amisit* and abduction of her were one entire conjoined cause of action for which the damages were given. That for the battery, true it was that the wife ought to have joined to recover damages, and that the verdict and judgment *did not bar the wife from an action*, after the death of her husband, for the battery, or that she might join with her husband in another action. And judgment was affirmed[1].

*In the case of *Smith v. Hixon* (*h*), it was held that [*352] the husband alone might maintain an action for the malicious prosecution of the wife, by means of which he was put to expense. After verdict for the plaintiff, upon motion in arrest of judgment, grounded on the omission of the wife, the court said, that though the remedy for the scandal might survive to the wife, it was no objection to the husband's action, and that he might undoubtedly proceed for the battery of the wife, *per quod consortium amisit*, and yet the action for the beating would survive to the wife.

From these cases it appears, that the husband may separately maintain an action for the damage resulting to himself, from a personal injury offered to the wife, for which personal injury they might have maintained a joint action and that the right of action would survive to the wife for the independent injury done to herself. The case of actionable words spoken of the wife, producing special dam-

(*h*) Str. 977. See also *Hyde v. Seyssor*, 8 Mod. 26. Cro. J. 538. Fort. 377. Cro. J. 604.

[1] In *Cowden v. Wright*, 21 Wendell 429, which was an action by the father for assaulting and beating his son *per quod servitium amisit*; the Supreme Court reversed a judgment because the jury in the C. P. had been charged that in estimating the damages they might take into account the *wounded feelings* of the parents, in consequence of the beating of the son.

age to the husband, seems to be, in all respects, perfectly analogous to those cited; and on their authority it may be concluded, that a husband, for such words, or rather for the damage resulting from them, may sue without his wife. *And it [*353] seems to be highly reasonable that the husband, in respect of the special damage, should be entitled to a separate action. In case the words had not been intrinsically actionable, the husband must have sued alone; and it can scarcely be contended that the injurious quality of the words can compel him to alter the nature of the proceeding, to recover for the separate tort to himself, the only alteration in the case consisting in the additional mischief to the wife. As the injuries are completely distinct, there seems no reason why the remedies should not be equally independent. A contrary supposition would involve this absurdity, that by the increased virulence of the words, the plaintiff would be placed in a worse situation as to his remedy, since, in case of actionable words, his title to damages would become dependent upon the life of his wife, and would be extinguished by her dying before judgment recovered.

Where, on the contrary, the words spoken of the wife are intrinsically actionable, the husband is not entitled to recover in a joint action, in respect of any mere consequential damage to himself. In such a case, therefore, where the husband and wife join, it would be improper to allege such consequential damage. The error, however, would be aided by a special *verdict, [*354] which excluded the consequential damage and confined the damages to the detriment sustained by the wife (*i*).

(*i*) 2 Mod. 66. 1 Lev. 3. 2 Lev. 101. Com. Dig. Pleader, C. 87. In the case of *Russell v. Corne*. 1 Salk. 119. Holt, R. 699. 6 Mod. 127. The husband and wife brought trespass and false imprisonment for the imprisonment of the wife, by means of which the domestic affairs of the husband remained undone, to the damage of both. After verdict for the plaintiff, it was moved, in arrest of judgment, that the business of the husband remaining undone, could not be to the damage of the wife, and that for such damage the husband ought to have brought the action alone. But it was answered, that the action being well brought and conceived for the imprisonment, what came under the *per quod* could only be taken in aggravation, as if words in themselves actionable be spoken of a wife and the husband and wife bring the action, and conclude *per quod*,

NEXT AS TO THE JOINDER OF SEVERAL DEFENDANTS.

Where the wrongful act is the joint act of two or more, the plaintiff may proceed against them in one and the same action; as, where the slander is contained in affidavits made by [*355] two, *but so connected as to form one slanderous charge (*k*) [1].

But where two persons speak the same words, the plaintiff must bring separate actions, for the acts are several in their nature, and the tort of one is not the tort of the other.

The defendants said to the plaintiff (*l*), "Thou hast the plate of J. S., and we charge thee with that felony." After verdict for the plaintiff, in an action against both, judgment was arrested. And the case of an action for mere slander differs in this respect from an action for charging the plaintiff with felony, and procuring him to be indicted; for, in the latter, the act of the defendants may be joint, and the plaintiff may proceed against them in the same action (*m*).

Though the husband and wife speak the same words, the plaintiff must bring different actions, and the court will not permit them to be consolidated, for it would be error to join the wife for words spoken by the husband only, and the declaration (*n*) would be ill either upon demurrer or in arrest of judgment.

But where, in an action against husband and wife for speaking

&c. the husband lost his customers, it would be well, for the words being in themselves actionable, the *per quod* should be taken in aggravation, all which the court allowed.

But Lee, C. J. is reported to have said (Str. 1094), "In a manuscript note which I have seen of this case in Salkeld, Holt, C. J. says, 'I will not intend that the judge suffered the husband's business remaining undone to be given in evidence.'"

(*k*) 2 East. 426.

(*l*) Cro. Jac. 647.

(*m*) B. N. P. 5.

(*n*) *Swithen and his Wife v. Vincent and his Wife*, 2 Wils. 227. *Subly v. Mott*, B. N. P. 5.

[1] To the same effect see *Thomas v. Rumsey*, 6 Johns. R. 27. *Harris v. Huntington*, 2 Tyler, 147, and *Patten v. Gurney*, 17 Mass. R. 182.

of the plaintiff certain *scandalous words, the jury found [*356] the husband guilty, and the wife not guilty, the plaintiff had judgment; for though the action ought not to have been brought against both, and the declaration would have been held ill on demurrer, yet the verdict cures the error (*o*).

Counts for oral and written slander may be joined in the same declaration (*p*), so a count for slander may be joined with one for a malicious prosecution (*q*).

OF THE AVERMENTS.

The declaration in this, as well as in every other action, consists of a clear and technical statement of the facts necessary to support the complainant's suit; so that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, by the court who are to give judgment upon them (*r*) and that the parties may afterwards avail themselves of the judgment (*s*).

*It has been at all times the fashion to preface the [*357] legal enunciation of the plaintiff's case with a preliminary panegyric upon his character; this is superfluous, since it does not affect the gist and essence of the action. A man of bad character is not to be represented as worse than he really is, and therefore is entitled to a compensation, to be measured by the excess of the scandal beyond what is really due to him. In one instance (*t*), indeed, it appears that the plaintiff's announcing himself to be of *good fame*, tempted the defendant to plead, that at the time of publishing the words the plaintiff was not of good fame; but the plea was held to be bad, since it answered matter of inducement which did not require any answer.

In a modern case, the plaintiff, in an action for a libel, imputing

(*o*) 1 Roll. Abr. 281. (*o*) pl. 1 Sty. 349. Com. Dig. Pleader, c. 87.

(*p*) King v. Waring, 5 Esp. C. 13.

(*q*) Manning v. Fitzherbert, Cro. Car. 271.

(*r*) Cowp. 682. Com. Dig. Pleader, C. P. 17. Co. Litt. 383. 2 B. & P. 267.

(*s*) 3 M. & S. 116.

(*t*) Strachey's case, Sty. 118.

to him seditious principles, prefaced his declaration with a boast of the uniform loyalty of his conduct; it appeared that he had been some time in confinement under the sentence of the court, for publishing a seditious libel; and the Lord Chief Justice (*u*) animadverted on the impropriety and absurdity of such a preamble.

The allegations relate to the act of publication, the matter published, the *application* of the matter published, the *motive* [*358] *in publishing, and to the *damage* occasioned by it.

First, as to the act of publication.

This is either of a libel, or of oral slander.

In the case of a libel, it appears that a publication in effect must be stated, though no particular form of words is required. In the case of *Baldwin v. Elphinstone* (*x*), it was assigned for error, that in the second count the defendant was charged with having *printed* the libel, and having *caused* it to be printed in the St. James's Chronicle, but was not charged with having *published* it. After argument in the Exchequer Chamber, the Justices and Barons were all of opinion that the judgment ought to be affirmed. That there are various modes of publication, and *no technical words are necessary* to describe it; that it is sufficient if there be stated in the declaration such matter as amounts to a publication without using the formal term published, and the jury are upon the evidence to decide whether a publication be sufficiently proved or not. That printing a libel may be an innocent act, but unless qualified by circumstances, shall *prima facie* be understood to be a publishing: it must be delivered to the compositor and other subordinate work- [*359] men. That *printing in a *newspaper* admits no doubt upon the face of it. The court further observed, "It is stated that he caused to be printed." This confirms the fact of publication, because it calls in a third person as agent, to whom the libel must have been communicated. In short, the count does not state generally, as it might have done, that the libel was published, but it expresses the particular mode of publication, viz: in a newspaper. It thereby puts the publication in issue, and the jury have found it so.

(*u*) Lord Ellenborough, C. J.

(*x*) 2 Bl. R. 1037.

It must be observed, that this was after verdict, which was relied upon by the court, and probably the declaration would have been considered to be defective upon special demurrer, for not stating a publication in more explicit terms.

In this case, too, great stress was laid upon the circumstance that the defendant had caused the libel to be printed in a *newspaper*; had the allegation been simply, that the defendant printed and caused to be printed the libel in question, it would have been difficult to have construed it into an averment that he published, for a man may print, and therefore cause to be printed, without the aid or privity of others.

The term *published* is the proper and technical term to be used in the case of libel, without reference to the precise degree in which the defendant has been instrumental to such publication; *since, if he has intentionally lent his assistance to its [*360] existence for the purpose of being published, his instrumentality is evidence to show a publication by him (*y*).

In a declaration for words spoken, it is sufficient to aver that the defendant spoke in the presence (*z*) of divers persons, without alleging that those present either heard or understood them, and it will be intended that they did hear and understand the words till the contrary appear.

But it would be insufficient to aver that the words were spoken, without stating them to have been spoken in the presence of some one (*a*), or without some averment which necessarily implied a publication to a third person, as that the defendant *palam et publicè* (*b*) *promulgavit de querente*.

It has been doubted whether it be sufficient to lay the words to have been spoken under a *cumque etiam*, by way of recital (*c*); but in the case of *Mors v. Thacker* (*d*), it was decided, that such an allegation in an action on the case is *good, [*361] though (as was said) it would be otherwise in trespass.

(*y*) Lamb's case, 9 Rep.

(*z*) Cro. E. 480. Noy 57. Golds. 119. Cro. J. 39. Cro. Car. 199.

(*a*) Sty. 70.

(*b*) Cro. Eliz. 861.

(*c*) 2 Mod. 41.

(*d*) 2 Lev. 193.

If the words be spoken in a foreign language, an averment is necessary to shew that the hearers understood them (*e*) ; and even where Welsh words were averred to have been spoken in Monmouthshire, which once was part of Wales, judgment was arrested after verdict for the plaintiff, because it was not averred that they were spoken before Welshmen, or those who understood the Welsh tongue (*f*).

In the *King v. Brereton* (*g*), the indictment stated that the defendant "*Scriptis fecit et publicavit seu scribi fecit et publicari causavit.*" And judgment was arrested on account of the uncertainty of the disjunctive charge ; and in a civil proceeding, such an averment would probably be considered defective, if pointed out by a special demurrer.

Next as to the publication of the *illegal matter*.

The words are either intrinsically actionable, or they derive their illegality from collateral circumstances ; it is therefore necessary to inquire, in the first place, how the mere words themselves are to be stated and connected with the plaintiff ; and secondly, [*362] where they are not *in themselves actionable, how they are to be connected with the collateral facts from which their actionable quality is derived.

First, as to the statement of the mere words : it has long been settled, that the declaration or indictment must profess to set out the very words published, and that it is not sufficient to describe them by their sense, substance, and effect.

It seems (*h*) formerly to have been held to be sufficient to set out the words, not in English, as they were delivered, but in the Latin language ; the permitting which clearly recognized the propriety of a substantial, in contradistinction to an actual and precise statement of the very expressions used, since in many instances it

(*e*) Cro. E. 396. Cro. E. 865.

(*f*) Cro. Eliz. 865.

(*g*) 8 Mod. 328.

(*h*) See *Hugh Pyne's case*, Cro. Car. 117, which was submitted to all the judges for their opinion, when many indictments for uttering traitorous and seditious words were cited, in many of which nothing more than the Latin translation was set out.

would be impossible to render the expressions used into Latin ones perfectly synonymous.

And it appears (i) to have been the opinion of Holt, C. J. in Dr. Drake's case, that the libel might have been set forth in the information in Latin, in which case a variance, which did not change the sense, would not vitiate it.

*No argument can, however, be drawn from this [*363] source, in support of a substantial, in opposition to a precise statement, the doctrine having been virtually overruled; for if it was sufficient to set out a Latin translation whilst the proceedings were drawn in Latin, it would, on the same principle, alter the passing of the statutes (k) which direct the English to be substituted for the Latin language in all legal proceedings, have been sufficient to set out a libel published in French or Italian merely by an English translation. But in the case of *Zenobio v. Axtell* (l), judgment was arrested, because a libel published in French had not been set out in the original language, but was merely described by way of translation. And Lord Kenyon, C. J. upon that occasion observed, that from the uniform current of proceedings it appeared that the original words should be set forth with an English translation, showing their application to the plaintiff.

In the case of the *Queen v. Dr. Drake* (m), Holt, C. J. is reported to have said, "A libel may be described either by the *sense* or by the *words*;" but by the Chief Justice's application of this doctrine, it appears that he did not mean that a mere description of the words by their **effect* would be sufficient; [*364] for he observes, "A libel may be described either by the sense or by the words of it, and therefore an information, charging that the defendant made a writing containing such words, is good, and in that case a nice exactness is not required, because it is only a description of the sense and substance of the libel; and if the jury find some omissions, it will be sufficient if *some words be proved*." The latter expression, "if some words be proved,"

(i) Holt. R. 351.

(k) 2 G. 2. c. 2. and 6 G. 2. c. 14.

(l) 6 T. R. 162.

(m) 3 Salk. 224. Holt R. 347. 349. 350. 425. 11 Mod. 95

clearly evinces that the very words, and not merely their effect, were to be set out; and that his lordship meant to say, not that it is unnecessary to state the words, but that they may be stated two ways, either by their *tenor*, in which case the pleader undertakes to set out the words with the greatest precision, and the libel given in evidence must agree exactly with the one set out in the information, or by stating that the defendant made a writing containing *inter alia* the words set out, in which case it would be necessary to set out those only which are material, and a variance would not be fatal, unless the sense were altered.

In the case of *Newton v. Stubbs* (n), the action was brought for words spoken, which were set out in the declaration *ad* [*365] *tenorem et effectum sequentum*; "and after verdict for the plaintiff, judgment was arrested, because it was not expressly alleged that the defendant spoke the very words.

In the case of the *King v. Bear* (o), the indictment was for composing, writing, making, and collecting several libels in *uno quorum continetur inter alia juxta tenorem, et ad effectum sequentem*, and the words were then set out.

And it was agreed that *ad effectum* would of itself have been bad, since the court must judge of the words themselves, and not of the construction the prosecutor puts upon them, but that the words *juxta tenorem sequentem* import the very words themselves (o). And it was held, that the words "*ad effectum*" were loose and useless words; but that the words *juxta tenorem* being of a more certain and strict signification, the force of the latter was not hurt by the former, according to the maxim "*utile per inutile non vitiatur*."

In the same case, that of *Ford v. Bennett* (p), was referred to, where, in a special action upon the case against *Bennett and others*, the plaintiff declared that the defendants, at Saltashe, procured a false and scandalous libel against the plaintiff to be written under the form of a petition, and the *libel was set forth after [*366] the word *continetur ad tenorem et ad effectum sequentem*. Two were found guilty, upon which judgment was entered for the plaintiff, and afterwards, upon error brought in the

(n) 3 Mod. 71.

(o) 2 Salk. 417.

(p) 1 Lord Ray. 415.

Exchequer, the judgment was affirmed, the exception taken to the words *ad effectum* having been overruled without consideration. And Holt, C. J. said, that he then thought the judgment to be given with too great precipitation; but he afterwards, upon great consideration, had esteemed it to be very good law. And the *King v. Fuller*(*q*), and the *King v. Young*(*r*), were cited as authorities in point; and the whole court were of opinion, that notwithstanding the exception, the indictment was good; but that if it had been only *ad effectum sequentem*, it had been ill, because it had not imported that the words were *the specific words* which were in the libel.

In the above case of the *Queen v. Drake* (*s*), a distinction was taken between an action for libel and one for words, and that in the latter case it would be sufficient to find the substance [1]. But in case of words spoken, as well as written, it has been held to be necessary to set out the words *themselves, and [*367] that it is insufficient to aver that the defendant spoke these words *vel his similia* (*t*) [2].

In Dr. Sacheverell's case, the defendant having been impeached for preaching several sermons, the question arose, whether the objectionable parts ought not to have been set out on the face of the impeachment; and it was proposed to all the judges, whether, by the law of England and constant practice in all prosecutions by indictment or information, for crimes and misdemeanors, by writing or speaking, the particular words supposed to be criminal must not be expressly specified in such indictment or information; and the judges present unanimously answered the whole of this proposition in the affirmative (*u*)

(*q*) Mich. 4 W. & M.

(*r*) Mich. 4 W. & M.

(*s*) Holt. R. 348. 350.

(*t*) Cro. J. 159. 1 Vin. Ab. 533. pl. 1. Br. Ac. sur. le. cas. pl. 112. 4 Ed. 6. 4 T. R. 217.

[1] In an action for *words* it is sufficient to prove *the substance of the words* laid in the declaration, *Miller v. Miller*, 8 Johns. R. 71. See also *Kennedy v. Lowry*, 1 Binney 393; *Kyzer v. Grubbs*, 2 McCord 305; *Ney v. Otis*, 8 Mass. R. 122.

[2] In *Bell v. Bugg*, 4 Munf. 260, a declaration charging the defendant with having spoken certain words or *words of the same import* held good after verdict.

(*u*) 9 St. Tr. Ann. But the Lords, notwithstanding this opinion of the judg-

In the case of *Cooke v. Cox* (x) it was held that a [*368] *count which alleged that the defendant had falsely and maliciously charged and asserted, and accused the plaintiff (a tradesman) of being in bad and insolvent circumstances, was bad in arrest of judgment; and the court came to this decision, upon a review of all the former authorities, and relied particularly on the opinion given by the judges, in Sacheverell's case. And the court intimated, that there was no difference in this respect, between criminal cases and civil ones, where the action arises *ex delicto*. And again, in *Wright v. Clements* (y), where the declaration stated, that the defendant published a libel, containing false and scandalous matter concerning the plaintiff, *in substance as follows*; and then set out the libel with innuendoes, the judgment, after a verdict for the plaintiff, was arrested.

Where the words have been spoken, or libel published in a foreign language, they must be set out in the original language, or the declaration will be bad in arrest of judgment (z). But, [*369] *it seems, that an English translation ought to be added [1].

es, resolved, that they would determine the impeachment according to the law of the land, and the law and usage of parliament; and that, according to the law and usage of parliament, it was not necessary in prosecutions by impeachment for high crimes and misdemeanors, by speaking or writing, to specify the particular words supposed to be criminal.

(x) 3 M. & S. 110. So in *Wood v. Brown*, 6 Tauat. 169, it was held, that to allege that the defendant had published a libel, purporting that the plaintiff's beer was of bad quality, was bad on demurrer.

It was observed, by the court, in the case of *Cooke v. Cox*, above cited, that what was supposed to have been said by Lord Hardwicke, in *Nelson v. Dixie*, Cas. temp. Hardw. 105, was founded in a mistake.

(y) 3 B. & A. 503.

(z) *Zenobia v. Axtell*, 6 T. R. 162. 3 M. & S. 116. But in an anonymous case, Hobart 126, the plaintiff declared against the defendant for calling him Idoner in the Welsh tongue, and had judgment, although he did not aver that the word amounted to a charge of forgery; and the case was cited, in which the plaintiff had judgment for the words, "Thou art a healer of felons," without any averment how the words were taken; because the court were informed, and took notice that in some counties the term *healer* was understood to mean a smotherer or coverer of felons.

[1] In *Wormouth v. Cramer*, 3 Wendell 394, the slanderous words were set

It is next to be considered with what degree of particularity and certainty the words or libel must be averred.

First, in the case of oral slander.

It has been said (*a*), that the strictness formerly observed as to proving the words precisely as laid, has been abandoned, and that it is sufficient to prove the substance of them; but, at the present day, it seems to be requisite to prove some of the words, though not all, *as they are laid* even in the case of oral slander.

If the slander (*b*) be contained in words of interrogation, it must be so laid, and must not be averred to have been spoken affirmatively.

*In the case of the *Lady Radcliffe v. Shubly*, (*c*) [*370] the words laid in the declaration were, "She is as very a thiefe as any that robbeth by the highway side." The jury found that the defendant spoke these words, "She is a *worse* thief than any that robbeth by the highway side." And Wary, C. J. was of opinion, that "as very a thief," and "a worse thief," are all one; but Gawdy and Fenner, justices, ruled that the words did not agree with the declaration.

So, an indictment for speaking these words of a magistrate (*d*), "He is a broken down justice," is not satisfied by evidence of the words, "You are a broken down justice." Lord Kenyon, indeed, in this case, held at nisi prius, that it was sufficient to prove the *substance of the words stated*, and the defendant was found guilty; but the point was reserved, in order that a verdict of acquittal might be entered, in case the court should be of a different opinion. On motion to that effect, Buller, J. said, that there was a case in *Strange*, in support of his lordship's opinion, but that it had since

forth in the declaration in *English*; it was proved they were spoken in *German*, and were *understood by the by-standers*. The plaintiff was non-suited, and the court refused to grant a new trial, holding that the proper mode of declaring in such cases is to state the words in the foreign language, to aver that they were understood by those who heard them, and to give their signification in *English*.

(*a*) B. N. P. 5 cites 2 Roll. Ab. 18. a. *Avarillo v. Rogers*, T. T. 1773.

(*b*) 2 East. 434. 8 T. R. 150. 4 T. R. 217.

(*c*) Cro. Eliz. 224. But see Dyer 75.

(*d*) R v. Berry, 4 T. R. 217. *Blisset v. Johnson*, Cro. Eliz. 503, contra.

been overruled in Lord Mansfield's time, and that he himself had known a variety of nonsuits on the same objection; and judgment was given for the defendant [1].

[*371] *So, where A. (e) says of B. and C. "You have committed such an offence," though B. and C. may have separate actions, each must state the words to have been spoken of both.

So, where the words are spoken (f) ironically, they must be stated as spoken, with an averment that they were spoken ironically.

Where the declaration stated these words of the plaintiff, "He stole a sheep of his," (innuendo of the defendant) it was moved in arrest of judgment, that *his* must refer to the last antecedent, and so that the words were repugnant, for a man cannot steal his own sheep (g); but the objection was overruled.

Upon the authority, however, of more recent cases, it seems the variance between the words *his*, as used in the declaration, and *mine* as proved in evidence, would be a ground of non-suit.

Where the words laid in the declaration, as spoken of a surveyor, were, "Harrison is a scoundrel; if I would have found him an oven for nothing, and given him after the rate of £20 per cent. upon the amount of the charges for work and materials, he would [*372] have passed my account." *The first witness called for the plaintiff proved these words: "Harrison is a scoundrel; and if I had allowed £20 per cent. he would have passed my account." The second witness proved the words, "Harrison is a scoundrel; and if I had deducted £20 per cent. he would have passed my account."

Lord Ellenborough, C. J. said, that words to be actionable, should be unequivocally so, and be *proved as laid*; but that, as the words

(e) Cro. Ca.. 512.

(f) 11 Mod. 86.

(g) 8 Mod. 30.

[1] Proof of words spoken in the *second person* will not support a declaration alleging the speaking to have been in the *third person*, *McConnell v. McCoy*, 7 Serg. & Rawle 223: so held on the strength of the decision of Lord Mansfield in *Avarillo v. Rogers*, Bull. N. P. 5. See also *Miller v. Miller*, 8 Johns. R. 74.

were proved, they did not support the declaration. The words of the declaration were, "If he would give me £20 per cent." that might mean something to himself, by which he would be himself benefited to the prejudice of his employer, but the words proved were, "If he would allow," or "if he would deduct £20 per cent." These words might import an allowance or deduction from the plaintiff's bill for the benefit of his employer, and were of a different meaning and import."

Where the words alleged in the declaration were, "This is my umbrella, he stole it from my back door," and the words proved were, "*It is my umbrella, &c.*" and it appeared that the words were not spoken in the house where the umbrella then was, it was held, that the variance was fatal; for the words, as laid, imported to have been spoken concerning a thing *present*, those proved were spoken concerning a thing not present at [*373] the time (*i*).

Where the words were spoken in answer to a question, and the injurious meaning is to be collected not merely from the terms of the answer, but from the question and answer together, the words must not be laid as a substantive and affirmative proposition, but according to the fact (*k*). If the defendant has not made an assertion as his own, but has merely alleged that some other person had reported the fact, it must be so averred, and if it were to be averred substantively, that the defendant had reported the fact, the variance would be fatal (*l*); for the charge is different, and open to a different defence. Where the declaration laid the words as follows, "A.'s wife is a great thief, and ought to have been transported years ago;" and the words proved were, "A.'s wife is a bad one, and ought, &c." it was held, that the words were misdescribed; the words laid imputed an act, those proved, suspicion only (*m*).

And variance may consist either in the *addition* or *omission* of one or more words, or in the *substitution* of one word for another. First, in the addition.

(*i*) *Walters v. Mace*, 2 B. & A. 756.

(*k*) See *Bromage v. Prosser*, 4 B. & C. 247.

(*l*) *Bell v. Byrne*, 13 East. 554. (*m*) *Hancock v. Winter*, 2 M. & S. 502.

[*374] *It is not necessary, in case of oral slander, to prove all the words, provided such of them be proved as are material [1].

The plaintiff declared that the defendant said of him, "He is a maintainer of thieves, and a strong thief." The jury found the whole to have been said except the word *strong*, and it was adjudged for the plaintiff (n) [a a].

And even where special damage is the gist of the action, it is sufficient to show that the loss was sustained in consequence of any of the words laid in the declaration (o).

But if all the words, as laid, constitute but one charge, the whole must be proved.

The declaration stated that the defendant said of the plaintiff, "He is selling his coals at one shilling a bushel, to pocket the money, and become a bankrupt to cheat his creditors." Upon the trial, the words "and become a bankrupt," were not proved, and the plaintiff was nonsuited (p).

And the reason applies with equal force in the case of libel, where the addition of a word not proved would be fatal, if it at all

(n) Burgis's case, Dyer 75.

[a a] Where the words laid in the declaration were, "I will do my best to transport him, as he has been working for me some time, and has been robbing me all the while," the proof was of the words, "he was worked for me some time, and has been continually robbing me;" it was held that the variance was not material. It was also held that the circumstance of the words having been spoken to an officer, who had a warrant to search the plaintiff's house for goods suspected to have been stolen from the defendant, made no difference. *Doncaster v. Hewson*, 2 M. and R. 176.

In another case in which the words laid in the declaration were, "*Warehawk, you must take care of yourself there*, mind what you are about," and were alleged to have been spoken to a person about to supply the plaintiff with goods, it was held that the omission to prove the words in italics was not a material variance. *Orpwood v. Barkes*, 4 Bingh. 261.

So where the plaintiff declared in respect of a libel upon him, in his character of surveyor of "The New England Company," it was held to be sufficient to prove an employment by a company, generally known by that name. *Rutherford v. Evans*, 6 Bingh. 451.

(o) 2 Esp. C. 491.

(p) *Flower v. Pedley*, 2 Esp. C. 491.

[1] So held in *North v. Van Slyck*, 2 Hill 282.

affected the sense, whether the words were set out under an *inter alia* or *ad tenorem*.

With respect to variances from omission, it *seems, in [*375] case of oral slander, to be sufficient to set out *the words which are material*, and it is not not even necessary to state words which may qualify the objectionable ones ; and in the case of libel, it may be averred in *uno quorum continetur inter alia* &c. (q) ; for, if something else were added, which did in fact qualify the objectionable words, it may be given in evidence on not guilty (r).

In Sir J. Sydenham's case (s), an action was brought for these words : " If Sir John Sydenham might have his will, he would kill all the true subjects of England, and the king too ; and he is a maintainer of papistry and rebellious persons." The defendant pleaded, that he spoke other words, *absque hoc*, that he spake these. The jury find that he spoke these words : "*I think, in my conscience*, if Sir John Sydenham," &c and found all the other words verbatim, and concluded *si super totum materiam*, he spake the words *formâ quâ* the plaintiff declared, they find for the plaintiff to his damage of 160 marks, if otherwise, for the defendant. And three of the judges, Montague, C. J. Croke, and Dodderidge, J. held, that the plaintiff was entitled to judgment, since the other words found were not *words of extenuation or [*376] alteration of the sense of the former words, but rather enforced them, and that there was no cause to stay the plaintiff's judgment.

" For though the plaintiff declared of fewer words than the defendant spoke, yet, he declaring truly that the defendant spoke those words, upon the evidence, it appears that he spoke those words which were actionable, and the words added diminish not, nor are an alteration of the sense of the words whereof he declares ; wherefore, although the issue be specially found, yet, the plaintiff shall have judgment."

The fourth judge (Houghton), was of opinion, that the omission

(q) R. v. Brereton, 8 Mod. 328.

(r) 8 Mod. 329.

(s) Cro. J. 407.

of part of the words proved, though the sense was unaltered, was a fatal variance.

A writ of error was afterwards brought upon their judgment, and one ground of error assigned was the variance between the words alleged and those proved ; and of this opinion were, Hobart, C. J. of the Common Bench, Winch, and Denham ; but, Tanfield, C. B. Warburton, Bromley, and Hulton, were of a contrary opinion, whereupon the judgment was affirmed (t).

With respect to the stating of libels, as a copy must [*377] be set out, which in proof is to be *compared with the original, it seems to be clear that any variance in the mode of setting it out, which in any way altered the sense, would be fatal ; and that although the mere mis-spelling of a single word would not be material, provided it was not altered into another word of a different meaning ; yet that any variance, either from omission or addition, which affected the meaning, would also be fatal.

For, if the libel alleged vary from that which is proved, in any material respect, they cannot be identical, and the cause of action alleged cannot be the same with that proved.

The general rule will be best illustrated by actual decisions.

Bell averred that Byrne printed and published, in the Morning Post, the following libel concerning the plaintiff, as purporting to be a letter written from A. to R. O'Connor.—“ I have sold all my property to B., yet it may still go on in my name, and the rents are to be transmitted to H. Bell, Esq. Charter-House Square. Mr. Bell (meaning the plaintiff,) has been for some time past confined in England, on a charge of high treason.” Upon the trial, it appeared, that the paragraph in question had been published by the defendant in his newspaper, of the 15th of May, 1810, and that it purported to be a statement of a speech delivered by the Attorney-

[*378] General for *Ireland, in the Irish House of Commons, on the 14th of Feb. 1799, in the course of which several letters were read by him. The defendant objected that the words “ Mr. Bell has been for some time past confined in England, on a charge of high treason,” did not constitute part of the letter alleged

to have been read by the Attorney-General, but were published as mere comment by him after reading the letter, and were therefore improperly described in the declaration, as purporting to be part of the letter. And the court of King's Bench, upon a motion to set aside the verdict for the plaintiff, and enter a nonsuit, were of opinion that the misdescription was fatal, and that the defendant should have been described as professing to publish a speech of the Attorney-General, for Ireland, in which was contained, &c. (u).

Where the libel given in evidence was contained in a book published respecting Mr. Cobbett, by the defendant, called "The Book of Wonders," and was as follows: Many well intentioned persons have expressed their surprise that the "Enlightener" should have been willing to accept of a seat in corruption's den, purchased with the bank notes of a man whose "incapability and baseness" he had so powerfully exposed. To convince such persons that this line of conduct *was strictly patriotic, we have only [*379] to assure them, that in so doing he was walking in the footsteps of that "venerable veteran," whose "creed is the criterion of excellence" (see No. 195), and who, in an article of that creed, has laid it down as a maxim, "that we must, in fighting the enemy, not reject the use of even despicable and detestable men," Cobbett v. 32, p. 82. The libel, as set forth in the declaration, omitted the words " (see No. 195)," and the words "Cobbett v. 32, p. 82." It was held that the variance was fatal; for upon reading the declaration, the libel would be understood to mean, that the defendant had himself made the assertions respecting the plaintiff, but, when the libel is produced, it appears, from the references which it contains, that the paragraph was written with intent to expose the conduct not of the plaintiff, but of another person (x).

One count of a declaration stated the words of a libel as follows: "My sarcastic friend, by leaving out the chorus or repetition of Monsieur T.'s poem, greatly injures the *tout ensemble*, or general and combined effect." The words proved in evidence were: "My sarcastic friend ΜΙΠΟΣ, by leaving out," &c., and it was held by

(u) Bell v. Byrne, 13 East. 554.

(x) Cartwright v. Wright, 5 B. & A. 615.

Lord Ellenborough, L. C. J., upon the trial of the *cause
[*380] that there was a material variance between the libel declared on in that count and the libel proved (*y*).

Where a declaration, in stating a libellous paragraph, imputing to the plaintiff that he had formerly a house in P., and some time prior to that he had one in M., in both of *which* he continued, omitted the words of *which* it was held that the variance was fatal (*z*).

But it is by no means necessary, even in case of libel, to set out the whole of the obnoxious publication; it is sufficient to extract the obnoxious passages, provided their sense be clear and distinct (*a*).

It is not even necessary to set out another part of the publication to which the libellous passage refers, provided the part which is set out be in itself distinct and intelligible (*b*).

But where distinct passages are extracted from the same libel and set out in the declaration, care should be taken to distinguish them, as by prefacing them with the words, in a certain part of which said libel, there was and is contained, &c. setting out
[*381] the passage, and in a certain other *part of which said libel there was and is contained, &c.; for if the facts were to beset out continuously, and the sense were thereby to be altered, the variance would be fatal (*c*).

With respect to the alteration of one or more letters of a word, the rule seems to be, that if the sense be thereby altered the variance will be fatal, but not otherwise (*d*).

With respect to the mis-spelling of a word, provided the sense be not altered, the variance is not material, even in an indictment for perjury. In the case of the *King v. Birch* (*e*), a variance was relied

(*y*) *Tabart v. Tipper*, 1 Camp. C. 350.

(*z*) *Cooke v. Smyth*, M'Clell. and Young, 250.

(*a*) *R. v. Brereton*, 8 Mod. 329. Cro. 645. *Sidnam v. Mayo*, 1 Roll. R. 429. Cro. J. 407.

(*b*) *Buckingham v. Murray*, 1 C. & P. 46.

(*c*) *Tabart v. Tipper*, 1 Camp. 350; and see *Sidnam v. Mayo*, 1 Roll. R. 429. Cro. J. 407, and quære, whether if the passages set out purported to be continuous passages, when, in fact, they were extracted from various parts of the publication, the variance would not be fatal. *Cooke v. Hughes*, 1 Ry. & M. 112.

(*d*) 3 Salk. 224.

(*e*) *Leach*, C. C. L. 158.

upon in favour of the prisoner between the indictment for perjury and the affidavit on which the prosecution was founded. In the affidavit, the defendant swore that he *understood* and believed, &c. The assignment of perjury in the indictment was, that he had falsely sworn that he *understood* and believed, &c. omitting the letter *s*.

Lord Mansfield—"This is an application for a new trial in an indictment for perjury, upon *the ground of a material variance between the affidavit and the indictment, the letter *s* being left out of the word *understood*. We have looked into all the cases on the subject, some of which go to a great length of nicety indeed, particularly the case in Hutton, where the word *indicari* was written for *indictari*, but that case is shaken by the doctrine laid down in Hawkins (*f*).

"The true distinction seems to be taken in the *Queen v. Drake* (*g*), which is this; that where the omission or addition of a letter does not change the word so as to make it another word, the variance is not material (*h*).

If the omission, even of a letter, render a word of a different signification from that contained in the libel, the variance seems to be fatal (*i*).

As when the word *not* was stated instead of *nor*; for, it was said, if, in such a case, a letter could be amended, why not a word, why not a sentence? and where would the *non ultra* be found, that this was not so small a variance of a letter as in false spelling or abbreviations, as if *gaine* instead of *gain*, where the word and sense would be the same; but that, in the *principal [*383] case the words were different and of different significations; different parts of speech, the one an adverb, the other a conjunction; the one positive, the other relative. It was observed, too, that though the objection was in appearance trivial, the consequences were weighty, and that if the variance were not considered

(*f*) 2 Hawk. Pl. C. c. 46. s. 190.

(*g*) Salk. 660.

(*h*) See Hart's case, Leach C. C. L. 172.
evidence, tit. Variance.

Douglass 194. Starkie on evi-

(*i*) 3 Salk. 224.

as fatal, the judges would have too great power in cases of treason, where the decision would be quoted as a precedent [1]. [*a a*]

Next as to the application of the matter published.—Where the expressions used are actionable, either in themselves, or by reason of consequential damage, without reference to any extrinsic circumstances, it is sufficient to shew merely their application to the plaintiff.

This is effected by means of a colloquium, or some express averment, that the words were spoken of and concerning the plaintiff, and an innuendo, in stating the words themselves, that he was the person meant (*k*).

Formerly it was the practice to aver, that the defendant spoke the words in a certain discourse which he had with others, or with the plaintiff himself in the presence of others, concerning the plaintiff. This was technically called laying a colloquium, [*384] *and till the case *Smith v. Ward* (*l*), it seems to

(*k*) The nature and office of an innuendo will afterwards be more particularly considered.

(*l*) Cro. Jac. 673. 3 Salk. 328. Sir T. Ray. 85.

[1] *U. States for United States* held an immaterial variance, *Lewis v. Few*, 5 Johns. R. 1. When variances have been held material or otherwise, see *Southwick v. Stevens*, 11 Johns. 443; *Tillotson v. Chetham*, 3 Id. 57; *Harris v. Lawrence*, 1 Tyler 156.

[*a a*] By the late stat. 9 G. IV. ch. 15, it is enacted that it shall and may be lawful for every court of record holding plea in civil actions, any judge sitting at nisi prius, and any court of oyer and terminer and gaol delivery in England, Wales, the town of Berwick upon Tweed, and Ireland, if such court or judge shall see fit so to do, to cause the record on which any trial may be pending, before any such judge or court, in any civil action, or in any indictment or information for any misdemeanor, when any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record, whereon the trial is pending, to be forthwith amended in such particular, by some officer of the court, on payment of such costs (if any) to the other party, as such judge or court shall think reasonable [1].

[1] In New-York it is provided by statute, that every variance between any instrument in writing, and the recital in or reference to in any pleading or writing, shall be disregarded upon the trial of a cause, unless the variance or mistake be calculated to surprise and mislead the opposite party, and to prevent his making due preparation for a full answer on the merits. 2 R. S. 328, § 99, 2d. ed. See also p. 343 and 344, and *Mappa v. Pease*, 15 Wendell 672. Matters in print as well as in writing, no doubt are within the meaning of this act.

have been doubted whether a declaration without a colloquium would be good. In that case, it was alleged that the defendant said of the plaintiff, "He (innuendo the plaintiff) is a thief;" and the court, on being informed that it was the common course to declare that he said *de prefato querente hæc verba*, held it to be sufficient without a colloquium.

But though the custom was to lay a colloquium, it was always held to be necessary to aver that the words were spoken concerning the plaintiff [*a a*].

Where actionable words are spoken to a plaintiff, it is sufficient to lay a colloquium with him without an express averment that the words were spoken *de querente*; for it cannot but be intended that the words were spoken to him with whom the conversation is alleged to have been had (*m*).

But where actionable words are spoken in the third person, as, "He is a thief;" though a colloquium of the plaintiff be laid, it is necessary to aver that the words were spoken concerning the plaintiff (*n*).

And it is not sufficient, in such case, to connect *the [*385] words with the plaintiff by means of an innuendo (*o*) [1].

But where a colloquium is laid, and there is an innuendo of the plaintiff, it seems that the want of a direct averment must be pointed out by special demurrer, and that it will be intended after verdict, or upon general demurrer, that the words were spoken of the plain-

[*a a*] Where the declaration alleged that the defendant did print and publish, of and concerning the plaintiff, a libel, containing the false and scandalous matter following, without alleging that *the matter was of and concerning the plaintiff*, and then set out the alleged libel, which, on the face of it, did not manifestly appear to relate to the plaintiff, and there was no innuendo to connect it with the plaintiff, the count was held to be bad, on a writ of error brought. *Clement v. Fisher*, 7 B. & C. 459.

(*m*) Roll. Ab. 85. pl. 8. 1 Will. Saun. 242. (*a*) n. 3.

(*n*) Roll. Ab. 85. l. 30. 1 Sid. 62. 1 Com. Dig. tit. Defam. G. 7.

(*o*) Cro. J. 126.

[1] See to same effect, *Sayre v. Jewett*, 12 Wendell 135. See also *Lindsley v. Smith*, 7 Johns. R. 359; *Nestle v. Van Slyck*, 2 Hill 282, and *Titus v. Follett*, Id. 318.

tiff; but where no communication is laid concerning the plaintiff, the omission of such an averment (*p*) is fatal to the declaration.

Where the person slandered is pointed out by the prefatory words thy son, thy brother, &c. or my son, my brother, which description may possibly apply to several, it seems, from the current of decisions, that the plaintiff must aver that he stood in the described relation, and that he was the son or the brother of the person addressed in the former case, or of the speaker in the latter, and that a general allegation that the words were spoken of and concerning the plaintiff is insufficient (*q*).

Where the words were, "Go, tell my landlord (innuendo the plaintiff) he is a thief (*r*)."

[*386] Judgment was given against the plaintiff, for not having averred that he was the landlord of the defendant, although he had averred that the words were spoken of himself. And it is not sufficient to bring the plaintiff within the description by means of an innuendo (*s*).

And even where the description could by possibility apply to one person only, it has been held that an averment is necessary, to shew that it was applied to him.

The plaintiff declared that the defendant having a discourse concerning the plaintiff with divers other persons, said these words of the plaintiff, "Your father (meaning the plaintiff) hath struck and killed Nicholas Russell." And after verdict for the plaintiff, judgment was arrested, because it was not averred that the plaintiff was father to him to whom the words were spoken (*t*).

In *Shalmer v. Foster* (*u*), the declaration stated, that "the wife of the defendant spake of the aforesaid plaintiff to Ann Rochester, the plaintiff's mother, these words, "Where is that lying thief, thy sonne, &c." And it was moved in arrest of judgment, that the

(*p*) Roll. R. 244. *Skutt v. Hawkens*, 1 Will. Saun. 242. a. n. 3.

(*q*) 1 Roll. 84. l. 15. 30. 50. 85. l. 45. Cro. Carr 443. Jon. 376. Cro. Eliz. 416, even after verdict.

(*r*) Cro. Car. 420.

(*s*) *Delamore v. Heskins*, Hill, 11 Car. K. B. 1 Vin. Abr. 528.

(*t*) Hil. 1652. Rot. 1037. 1 Vin. Ab. 530. Golds. 187. Cro. Eliz. 416. 439. Cro. Car. 92. 173. Mo. 365.

(*u*) Cro. Car. 177. But See Cro. J. 107.

words were uncertain, no precedent communication being alleged to be of *the plaintiff, nor that he was the only [*387] son of the said Ann Rochester, to whom the words were spoken, and that it might be that she had divers sons, and every of them might have an action as well as the plaintiff, and that there was an ambiguity who was meant by the words. And Whitelock and Croke were of that opinion; and the latter cited the cases of Harvey and Chamberlain (*x*), and of Burnet and Codman (*y*), where for such words it was adjudged for the defendant. But Hyde, C. J. and Jones, J. doubted thereof, because it was alleged that she spoke of the plaintiff, and was found guilty. But it was answered, that so were the words in every declaration, and that so it was in the precedents cited (*z*).

At this day, after so many of the technical niceties, with which actions of this description were formerly encumbered, have been defeated, it may be well doubted whether much attention would be paid to these cases. The real end and object of such averments is, to shew with certainty that the plaintiff is the person aimed at by the defendant; and though, upon the face of the words themselves, their application may be ambiguous, as where the defendant says, thy son, or thy brother, yet there appears no want of certainty upon the record, when it is alleged that *the words were [*388] spoken of the plaintiff; and whether they were so applied or not, is a matter of evidence, to be proved by shewing that he did stand in the relation specified, without due proof of which the jury could not possibly find the truth of the averment that the words were spoken concerning him.

Considering, however, the great number of express decisions upon this subject, it would not be prudent to omit a special averment. Thus if the words were, "He who lives at No. 1, Doubtful Place, is a receiver of stolen goods," it would be proper that the plaintiff, being the person meant, should allege that he lived at No. 1, Doubtful Place, when the words were spoken, and not only to aver that the words were spoken of him, but also to allege specifically that they were spoken in reference to the house in which he so lived.

(*x*) E. T. 20 J. 1. (*y*) T. T. 5. J. 1. (*z*) The court adjourned.

Where the description may apply to several persons, as brothers or sons, it is unnecessary for the plaintiff to aver, that he was the only brother or only son, so as to make it appear that the description applied to himself exclusively. This objection, however, appears to have frequently been taken; and in *Wiseman v. Wiseman* (a), where the defendant spoke the words *de prefato querente existente fratre suo naturali*, on motion in arrest of judgment, it was [*389] held by Yelverton, *J. that the words were too uncertain that words, to be actionable, ought to import in themselves precise slander without ambiguity, so that every one who heard them might intend of whom they were spoken; for otherwise, if it could be helped by the averment of the plaintiff, every one who was his brother might make the same averment, and have an action which would not be reasonable. But it was afterwards adjudged, by all the judges, for the plaintiff.

A distinction was taken in the last case by Tanfield, J. between words importing in themselves apparent uncertainty, and those which might be ascertained by intendment. That, in the first case, no averment would aid the uncertainty, but that, in the latter, it might be aided by an averment and verdict; and therefore, if the words had been "one of my brothers is perjured," there would be in them an apparent uncertainty; and that, although one of the brothers should bring the action, and aver that they were spoken of him, yet that because it appeared to the court that there were divers brethren, and that it did not appear to any of whom he spake, no action would lie, although the defendant should be found guilty by verdict.

But it has since been held (b), that for disjunctive words, as that A. or B. committed such a felony, both A. and B. are [*390] entitled to recover, and it would probably now be decided upon the same principle, that in the case put by the learned Judge, each brother would be allowed to maintain his action [1].

(a) Cro. J. 107.

(b) *Harrison v. Thornborough*, 10 Mod. 196.

[1] Same doctrine held in *Gidney v. Blake*, 11 Johns. R. 54. See note [1] page 110, *ante*.

When the plaintiff's name is mentioned, though a further description be given (*e*), the general averment is sufficient, without a special allegation that such further description applied to the plaintiff. As, where the speaking is alleged to be of the plaintiff, and the words are stated, "T. (innuendo the plaintiff) is thy brother, &c." it is sufficient without any other averment.

In *Nelson v. Smith* (*d*), the words were, "Captain Nelson is a rogue and a thief, and hath stolen away my goods;" and it was held, that the declaration was good without any averment that he was a captain, or known by that name, inasmuch as there was a communication of the plaintiff, and it was averred that the words were spoken of him.

The general rule is, that where the party can shew that he was intended by the defendant, he may maintain an action, whatever be the mode of description.

Thus, for the words, "The parson of Dale is a thief;" it was held that he who was parson of *Dale at the time [*391] the words were spoken might maintain an action (*e*).

The defendant said, "That murderous knave Stoughton lay in wait to murder me;" and the action brought by Thomas Stoughton was held to be maintainable (*f*).

But, in the next place, whenever the actionable quality of the publication arises from circumstances *extrinsic* of the words themselves, averments are necessary to shew that such circumstances exist, and to connect the words with those circumstances.

Thus, if the words were—"He was concerned in the late affair at B.'s house," the words unexplained would not bear any actionable construction; but if they were spoken with reference to a burglary lately committed, or supposed to have been committed, at B.'s house, and it was intended to impute to the plaintiff a participation in the crime, they would become actionable. But in order to shew their actionable quality on the face of the record, it

(c) Cro. Eliz. 429.

(d) 22 C. 1. B. R. See also *Osborne v. Brookes*, 1 Vin. Ab. 529. 1 Roll. Ab. 85.

(e) 3 Bulst. 326.

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(f) Sheppard, Action of Slander, 59.

would be essential to allege the facts, and next to shew that the words were spoken, or libel published, in reference to those facts.

The technical mode of effecting this, is, first, to state, [*392] in the introductory part of the declaration, *those special circumstances, in reference to which the publication is actionable.

Secondly, To shew generally, by means of proper averments, that the words, or libel, were published of and concerning the facts and circumstances so previously alleged.

Thirdly, To connect the words, or libel, set out with such previous facts by means of proper innuendos.

By this process such extrinsic facts are incorporated, as it were, with the defendant's publication, and a complete slanderous charge appears on the face of the record.

In what cases it may be necessary to state prefatory circumstances, to be afterwards connected with the publication by means of a colloquium and innuendos, is of course a matter in which the pleader must exercise his discretion in the particular instance before him; the only general rule that can be laid down is, that such circumstances must be introduced upon the record, as will enable the court to decide upon the actionable quality of the publication, and the jury to find the facts which are connected with it [*a a*] [1].

[*a a*] Where the declaration averred that the plaintiff was a justice of the peace, and that the libel was published of him as such justice, and the alleged libel stated, in substance, that the plaintiff had been chairman of the finance committee of the county, and had audited accounts containing items to a large amount, nominally to furnish lodgings for the judges, but, in reality, for the accommodation of the magistrates, as the sheriff had always provided suitable lodgings without putting the county to any expense, innuendo: (thereby meaning that the plaintiff had conducted himself corruptly, unduly, and improperly, in his office of justice,) it was held, that the libel was not on the face of it actionable, and that there being no preparatory averment to which the innuendo, by referring, might have shown it to be an offence in him to have so audited the accounts, the defect was not cured by verdict: and judgment was therefore arrested. *Adams v. Mendew*, 2 Y. and J. 417. See also *Goldstein v. Foss*, vol. 2, p. 305; *Stockley v. Clement*, *id.*

Where the libellous meaning is apparent on the face of the libel, innuendos are unnecessary, but though they be unnecessarily introduced and be unsupport-

It may be laid down as a general rule, that where *the slanderous charge or imputation can be collected from the words themselves, it is unnecessary to make any averment as to circumstances, to whose supposed existence the words refer.* For the [*392] slander, which is the ground of proceeding, appearing on the very face of the publication, it is a matter of indifference as to the cause of action, whether the circumstances referred to really existed, or were invented by the defendant.

Thus, when a person says of another (*g*), "That is the man who killed my husband," no averment of the husband's death is necessary, for the defendant's words have ascertained the death.

The defendant said to the plaintiff (*h*), "Thou hast given J. S.

ed by prefatory averments, they do not vitiate the declaration. *Archbishop of Tuam v. Robeson*, 5 Bingh. 17.

[1] Where the words or libel do not necessarily point to the plaintiff, as the individual slandered, it is indispensable to the maintenance of the action, that in the introductory part of the declaration, extrinsic facts and circumstances be averred, so that when they are received in connection with the words or libel and with the innuendos, the conclusion will be inevitable that the plaintiff is the person slandered: or in other words the extrinsic facts must be so incorporated into the declaration, as to be made an integral part of the case, and the whole thus form one entire slanderous charge upon the face of the record, *Gibson v. Williams*, 4 Wendell 320; and *Miller v. Maxwell*, 16 Id. 91. So where from the ambiguity of the terms used in reference to the offence charged, the words have a covert-meaning, to render the declaration good, it must be averred that they were spoken *with the intent to charge a particular crime*; the difficulty cannot be obviated by an innuendo. *Andrews v. Woodmanse*, 15 Wendell 232. An averment thus made is *the subject of proof*, whilst an innuendo is not. Witnesses may be called to detail facts and circumstances within their knowledge, relied upon to shew either that a crime was *imputed*, or that it affected the *plaintiff*; but it seems the courts in New-York hold that it is not proper to allow the witnesses to state their conclusions from the facts, as to the intention of the defendant to apply the words or libel to the party or circumstances as alleged, *Van Vechten v. Hopkins*, 5 Johns. R. 211, and *Gibson v. Williams*, 4 Wendell 320. Mr. Starkie, in his treatise on the Law of Evidence, part iv. page 861, lays down the rule directly the reverse. What is said by him is adverted to and condemned by the learned judge, who pronounced the opinion of the court in *Gibson v. Williams*.

(*g*) *Button v. Heywood and his wife*, 8 Mod. 24. Vent. 117.

(*h*) *Cro. Car.* 337.

£9, for forswearing himself in chancery, and hast hired him to forge a bond." After verdict for the plaintiff, it was moved, in arrest of judgment, that the declaration contained no allegation that any suit was in chancery, or that J. S. forswore himself in his answer, or as a witness, or that the plaintiff suborned J. S. to forswear himself, or shew any particular wherein he forswore himself. But it was held that these averments were immaterial; for if J. S. never was sworn, it was scandalous in the defendant to say that the plaintiff procured J. S. to forwear himself in a court of record, although it was merely false, because he never was sworn. And that as to the bond, though it was not said that J. S. had forged a bond, the charge against the plaintiff was nevertheless scandalous.

*In an action for these words (*i*), "Thou hast killed [*394] thy master's cook," on motion in arrest of judgment, it was held to be unnecessary to make any averment, shewing who the plaintiff's master was, or that he was the master of the person slain, because the words in themselves imputed slander.

In *Wilner v. Hold*, the words were, "Thou art a rogue and a rascal, and hast killed thy wife." On motion in arrest of judgment, amongst other causes, it was alleged that an action lay not for the words, because it was not shewn that the wife was dead, or how she was killed; but the objections were overruled (*k*), and the plaintiff had judgment.

In declaring for the words, "I will call him in question for poisoning my aunt," there needs no averment that the aunt was poisoned (*l*).

There are, notwithstanding, many cases to be found in the books where averments of this kind have been deemed to be indispensable; but as these are contradicted by the more modern decisions (*m*), and are rather remarkable for their subtlety than for either convenience or consistency, it would be a waste of time [*395] to take further *notice of them than by citing a few specimens.

(*i*) *Cooper v. Smith*, Cro. J 423.

(*k*) See 1 Vin. Ab. 513. pl. 1. 2.

(*l*) Cro. Eliz. 569, 823.

(*m*) *Peake v. Oldham*. Cowp. 275

After verdict for the words, "Thou art as arrant a thief as any in England," (*n*) it was held, in arrest of judgment, that the words were not actionable, for want of an averment that there was any thief in England.

After verdict for the words, "Thou art a murtherer, for thou art the follow that did kill Mr. Sydnam's man," judgment was reversed, for want of an averment that any of Mr. Sydnam's men had been slain (*o*).

The words were, "Whosoever he is, that is the falsest thief and the strongest in the county of Salop, whatsoever he hath stolen, or whatsoever he hath done (*p*), Thomas Haselwood is falsier than he," it was held necessary to aver that there were felons in the county of Salop. But this resolution is to be attributed to the anxiety of the courts to discourage such actions; it seems pretty clear that at the present day, no such averment would be deemed necessary.

It would be sufficient to aver that the defendant, intending to charge the plaintiff with felony, spoke the words; and in setting them out, to add *an innuendo to the same ef- [*396] fect, in which case a verdict for the plaintiff would be conclusive as to the defendant's meaning and intention.

The introduction of useless averments is in all cases objectionable, inasmuch as it encumbers the plaintiff's case upon the trial with unnecessary proof, and in some instances the superfluity may prove fatal to the declaration.

In the case of *Snag v. Gee* (*q*), where it appeared upon the record that the person with whose murder the plaintiff had been charged by the defendant, was still alive, it was held that no action was maintainable.

And where the words of the defendant are general, no explanation is necessary to render them more particular.

The defendant (*r*) charged the plaintiff with having forsworn

(*n*) *Foster v. Browning*, Cro. J. 687.

(*o*) *Barons v. Ball*, Cro. J. 331.—See a conjecture upon the original reason of this scrupulous nicety, p. 81.

(*p*) *Shepp. Ac.* 269.

(*q*) 4 Rep. 16. 1 Vin. Ab. 409. pl. 4.

(*r*) *Sir R. Snowe v. ———*, Cro. Car. 321.

himself in his answer to a bill in chancery. After verdict for the plaintiff, it was moved, in arrest of judgment, that the particulars of the perjury imputed were not pointed out in the declaration, and that many indictments for perjury had been quashed, for not showing the perjury to have been in a material point. But the court held, that though indictments ought to show the cause of
 [*397] perjury, yet that in an action *for words which is grounded on the speech of another, the charge cannot be enlarged further than the other spoke.

So, in cases where a felony is charged, it is unnecessary to make any averment, introducing any circumstances relating to a felony actually committed; so, with respect to imputations of forgery or perjury, where the meaning can be collected from the defendant's own words, no averment ought to be made as to the existence of any circumstance to which the defendant might by possibility allude, since it has been long settled that their existence is perfectly immaterial to the maintenance of the action (s)

But in case of a charge of forswearing, unless from the accompanying words, it be clear that a judicial forswearing was meant, the plaintiff must show upon the record that the defendant alluded to some particular forswearing which amounted to perjury. Thus, in a declaration for saying, (t) "A. B. being forsworn, compounded the prosecution," no introduction of extrinsic facts is necessary, since an indictable forswearing must have been meant; but in declaring for the words (u), "He has forsworn himself in Leake Court," it is necessary to show that Leake Court was one
 [*398] *in which the offence of perjury could have been committed.

In the *King v. Horne* (x), the libel, as stated in the information, was averred to be of and concerning his said majesty's government, and the employment of his troops. The libel, as set forth in the information, advertised a subscription for "the relief of the widows, orphans, and aged parents of our beloved American fellow subjects, who, faithful to the character of Englishmen, and preferring death

(s) Vid. Supra 85.

(u) 1 Roll. Ab. 39. pl. 7. 6 Bac. Ab. 207.

(t) Cro. Eliz. 609.

(x) Cowp. 682.

to slavery, were, for that reason only, inhumanly murdered by the King's (meaning his said majesty's) troops at or near Lexington and Concord, &c. in the province of Massachusetts." The defendant having been found guilty, objected, in arrest of judgment, that there was no averment as to the state of the Massachusetts colony at that time, or that the king had sent any troops there, or that the employment of the troops was by the king's authority.

Lord C. J. De Grey, in giving judgment, observed, "The words in the present case are, that the defendant, of and concerning the king's government and the employment of his troops, said, 'that innocent subjects had been inhumanly murdered by the king's troops for preferring death to slavery.' Do these words import, in *their natural and obvious sense, that the king's troops [*399] were employed by the act of government inhumanly to murder the king's innocent subjects? There can be no doubt but that the king's government comprehends all the executive power, both civil and military, that he employs all the national force, and that his troops are the instruments with which part of the executive government is to be carried on. The introductory part of this information charges that the subject of the writing in the present case was, "the troops and the king's troops, and the business they had done."

"It has been truly said, that the king's troops may, like other men, act as individuals, but they can be employed as *troops* by the act of government only. If the averment, therefore, amount to this, that in the discourse which was held, the words were said, 'of and concerning the king's government,' the natural import appears to us to be this: 'I am speaking of the king's administration, of his government relative to his troops, and I say, that our fellow subjects faithful to the character of Englishmen, and preferring death to slavery, were for that reason only inhumanly murdered by the king's order, or the orders of his officers.' The motive imputed tends to aggravate the inhumanity of the act, and consequently of the imputation itself, because it *arraigns the government [*400] of public trust, in employing the means of the defence of the subject, in the destruction of the lives of those who are faithful and innocent.

“As to any other circumstances not stated in the information, if those which are stated do of themselves constitute an offence; the rest supposed by the defendant, whether true or false, would have been only matter of aggravation, and not any ingredient essential to the constitution of the crime, and therefore not necessary to be averred on the record.”

With respect to the allegation of collateral circumstances, in reference to which the publication is actionable, care should be taken not to allege them too minutely, and not to allege more than is necessary, for where the actionable quality of the publication depends wholly on its connection with collateral matter, a variance in proof of those matters has frequently been held to be fatal.

Where the words are actionable in reference to the special character of the plaintiff, as a physician, barrister, clergyman, or tradesman, a prefatory averment of such his character and situation is of course in all cases essential.

In the description of the special character in which the plaintiff sues, some nicety is to be observed, in not averring
[*401] more than is necessary; *for, since the averment of character is material, the plaintiff upon the trial will be bound to prove it, with all the circumstances with which the description in the declaration is encumbered, though a much more simple one might have sufficed.

In an action for words, the plaintiff (*y*) declared that he was *in medecinis doctor*; and it was moved in arrest of judgment, because he did not shew that he was licensed by the College of Physicians, or that he was a graduate of one of the universities according to the statute (*z*). But Bankes, C. J. and Crawley, J. were of opinion that the act was a general one, which need not be pleaded.

And even had the statute been a private one, it seems that the plaintiff in such an action would not be bound to set out his title, since, in general, an action on the case against a wrong doer for a disturbance, it is sufficient for the plaintiff to allege his right generally, without showing a title (*a*).

(*y*) Dr. Brownlow's case, Mar. 116. pl. 3. 1 Vin. Ab. 539.

(*z*) 14 H. 8. c. 5.

(*a*) 2 Vent. 292. Cro J. 43. 123. Com. Dig. Pleader, c. 39.

And in an action brought by a physician, it is sufficient to aver (*b*) that he had used and exercised *the [*402] profession of a physician; but if he were to aver that he was a physician, and had duly taken the degree of doctor of physic, he would at all events be required to prove his degree as stated (*c*); and if he were unable to prove it, he would fail.

But though the plaintiff need not aver how he came by his title, he must describe it in apt terms. Thus, in an action brought by a barrister, he ought to aver that he is *homo consiliarius*; and it is not sufficient to say that he is *eruditus in lege* (*d*).

It was formerly held, that it was necessary for a tradesman (*e*) to aver in an action for words of his occupation or trade, that he got his living by buying and selling; but this arose from the idea, that the words, to be actionable, must import bankruptcy, and must be applied to a person who was liable to the statutes of bankruptcy, which has long been exploded (*f*): it is sufficient to aver that the plaintiff exercised the trade, and derived profit from it.

Next it should appear that the special character *be. [*403] longed to the plaintiff at the time of the publication.

So little precision has been required as to this statement, that it has been held that the averment by the plaintiff, that he is of such a trade, or has exercised it for divers years (*g*), without saying *ultimo et jam elapsos*, or that he is a freeman exercising the art or mystery of a linen-draper for the space of five years past, or that he has been an attorney (*h*) for divers years now elapsed, was sufficient, without an express averment that he was such at the time the words were spoken, since it is not to be presumed that a man alters his trade or profession.

In the case of *Dodd v. Robinson* (*i*), the plaintiff declared that he was inducted into a parsonage in Ireland, and executed the office

(*b*) 8 T. R. 305. (*c*) 8 T. R. 303. 1 N. R. 196. 2 Buls. 230.

(*d*) 1 Vin. Ab. 539. pl. 2. According to Coke, C. J. the technical description is *homo consiliarius et in jure peritus*.

(*e*) Sid. 299. 1 Vin. Ab. 539. (*f*) Vide supra, 134, 135.

(*g*) Tuthill v. Milton, Yel. 159. This was after verdict.

(*h*) 2 Roll. R. 84. 1 Vin. Ab. 538.

(*i*) All. 63. 64. 1 Vin. Ab. 538. note to pl. 3.

of pastor for four years after. It was moved in arrest of judgment that he did not aver that he was a parson at the time of speaking the words.

But the court said, it should be intended that he continued parson because he had a freehold in the parsonage during his life.

In the case of *Tuthill v. Milton* (*k*), the court said, that an action for words which affect the plaintiff in his office which [*404] he holds during pleasure, * it must be expressly averred that he was in the office at the time the words were published ; but that if the words relate to his profession or trade, it is sufficient to aver that he has for some years past exercised the profession or trade, for that it shall not be intended that he has discontinued such profession or trade.

But in the subsequent case of *Collis v. Malin* (*l*), where the plaintiff declared that he had, for a great while, used the trade of buying and selling cattle, and that the defendant said of him, " Thou art a bankrupt," after verdict for the plaintiff, judgment was arrested.

After verdict, indeed, if the continuance can be collected from any averment or circumstances, the want of a precise and technical allegation will be cured.

As, where the plaintiff, after alleging that he *was* a justice (*m*) of the peace for the county of Leicester, for divers years, averred that the defendant spake these words of him, *being a justice of the peace*.

So the continuance may be collected from the words themselves ; as if the defendant say of an attorney, that " he plays with both hands (*n*)."

[*405] *It seems, in general, to be sufficient to allege generally that the plaintiff was a physician, barrister, or attorney, at the time of the alleged injury, without more.

It is unnecessary to aver that the plaintiff has qualified himself to

(*k*) Cro. Jac. 222. Yelverton 159.

(*l*) Cro. Car. 282. See also 2 Roll. 84. Dan. 170.

(*m*) Beaumont v. Hastings, Cro. J. 240.

(*n*) 2 Roll. 85.

act in the situation or office, in respect of which he is slandered, according to the enactments of any statute (*o*).

Where the words or libel derive their injurious quality from extrinsic circumstances, which are averred upon the record, it is obvious that the allegations by which the words or libel are applied to such extrinsic subject matter, become descriptive of the nature of the injury.

And, consequently, that a material variance in proof from such averments must be fatal.

Where the plaintiff stated that he was the proprietor and editor of a newspaper calumniated by the defendant, it was held to be insufficient to prove merely that he was the proprietor (*p*).

Where the declaration stated that the plaintiff was an attorney of the Court of King's Bench, and had been employed by the defendant, as his attorney, to defend an action, wherein one "G. W. L. had been the plaintiff and the present defendant had been the defendant, and the words, "I have got rid of a rogue in Willey, and I have got rid of a bigger rogue in Parry" (the plaintiff), were alleged to have been spoken of the plaintiff's conduct in that cause; it was held, that as the words were laid as spoken of the plaintiff, in the conduct of a certain action, that action was the ground work of the inquiry, and that its existence ought to be proved (*q*).

In an action (*r*) for a libel on a constable, alleged in both counts of the declaration to have been published of and concerning his conduct in the apprehension of persons stealing a dead body, it was

(*o*) See *Hartley v. Herring*, 8 T. R. 131.

(*p*) *Herriot v. Stuart*, 4. Esp. C. 437. *Ld. Kenyon, C. J.* See also *Stevens v. Aldridge*, 5 Price 231. *R. v. Shaw*, 1 Leach C. C. L. 79. 2 East's P. C. 580. *R. v. Ellis, Russell and Ryan*, 188. *Sellers v. Till*, 4 B. & C. 655. But see *Lewis v. Walter*, 3 B. & C. 138. *Supra* 398.

(*q*) *Parry v. Collis*, 5 Esp. C. 339. And it was held, that it was not sufficient to show that the costs had been levied and paid, and that all the papers had been given up to the defendant, and that notice had been given to the defendant to produce all papers, &c. *Lord Kenyon* said, that he presumed that the roll had been carried in, to which the plaintiff might have had access, and given a copy in evidence.

(*r*) *Teesdale v. Clement*, 1 Chitty, 603.

averred, in what that conduct had consisted, viz. that he had carried that body to Surgeon's Hall; and it was held to be necessary to prove the introductory allegation, inasmuch as it was material to the defamatory character of the libel itself (s).

But, on the other hand, the omission to prove
[*407] *facts unnecessarily alleged, will not be fatal, unless by the form and mode of pleading they have been made descriptive of that which is material.

An information alleged that the king had issued a particular proclamation, and also averred, that on occasion of that proclamation, divers addresses had been presented to his Majesty by divers of his subjects; the information charged the defendant with a publication with the intent to bring the said proclamation into contempt, but did not refer to the addresses; and it was held to be necessary to prove the fact, that such a proclamation had been issued (t); but it seems that it was unnecessary to prove that any addresses had been presented (u).

In an action on the case for exhibiting an inscription tending to defame the plaintiff as the keeper of a brothel, the declaration contained a prefatory allegation, that the plaintiff carried on business as a retailer of wines, but it was held that proof of the fact was unnecessary, there being no colloquium of the trade (x).

And although the words or libel be alleged to have been spoken and published of and concerning subject matters previously
[*408] viously alleged, yet a variance in the omission to *prove the whole of such previous allegations, will not be material, provided these allegations be of a divisible nature, and those which are not proved be not material to the defamatory character of the libel itself. For the allegation is not descriptive of the words or libel, but of the nature of the injury; and if the several matters in reference to which the libel is alleged to have been published, be cumulative and divisible, so also the application of the libel to such subject matters, and the injury arising from that application may be considered to be divisible.

(s) See the observations of Abbott, C. J. upon this case, 3 B. & C. 124.

(t) R. v. Holt, 5 T. R. 436.

(u) Per Buller J. ib.

(x) Spull v. Massey, 2 Starkie C. 559.

The declaration alleged the publication of a libel, of and concerning the plaintiff, and also of and concerning the plaintiff in his business or profession of an attorney, and the plaintiff having failed in proving that he had either taken out his certificate, or practised in the year in which the libel was published, he was in consequence nonsuited; but it was afterwards decided, by the Court of King's Bench, that the allegation was not descriptive of the libel, and consequently, that there was no material variance (*y*). So, where the declaration alleged that *the [*409] plaintiff was vestry clerk of the parish of M——s; that, whilst he was vestry clerk, certain prosecutions were carried on against B. of certain misdemeanors, and that in furtherance of such proceedings, and to bring the same to a successful issue, certain sums of money, belonging to the parishioners were applied in discharge of the expenses; and that the defendant, to cause it to be suspected that the plaintiff had fraudulently applied money belonging to the parishioners, falsely and maliciously published of and concerning the plaintiff, and of and concerning his conduct in his office of vestry clerk, and of and concerning the matters aforesaid, a certain libel, &c. It appeared upon the trial, upon the production of the libel, that the imputation was, that the plaintiff had applied the parish money in payment of the expenses of the prosecution after it had terminated. And it was held, that the variance was unimportant; for it was immaterial to the character of *the libel, whether the money were so applied before or [*410] after the termination of the prosecution (*z*).

(*y*) *Lewis v. Walter*, 3 B. & C. 138. But where the plaintiff alleged that he was treasurer and collector of certain tolls, and that the defendant published of him, as such treasurer and collector, “ You are gathering the toll for your own pocket,” thereby then and there meaning that the plaintiff, so being such treasurer and collector, was guilty of collecting tolls for the purpose of improperly applying them to his own use; the plaintiff having proved that he was *treasurer* only, and not collector, the variance was considered fatal, and the court of K. B. refused to set aside a nonsuit. For the words were applicable to the plaintiff rather in his character of collector, than of treasurer; the plaintiff was bound to prove that the words were applicable to him, in the manner which he himself had pointed out by his innuendo. *Sellers v. Till*, 3 B. & C. 655.

(*z*) *May v. Brown*, 3 B. & C. 113. In the case of *Lord Churchill v. Hunt*,

The plaintiff declared that he had been a wool-stapler at Cirencester, and that at the time when the words were spoken he was a brewer at Oxford, and that the defendant spoke of him, as such trader, these words, “ Mr. H. (the plaintiff) and B. have both been bankrupts ; Mr. H. at Cirencester ;” the plaintiff proved [*411] that he was, when *the words were spoken, a brewer at Oxford ; but gave no evidence of his having been a wool-stapler, and proved also that the defendant spoke the words, “ He was a bankrupt at Cirencester,” and it was held that the evidence supported the allegations, for a trader at Oxford might have been a bankrupt at Cirencester (a).

With respect to words published in a foreign language, and phrases or terms whose use is confined to a particular district or class of people, and not generally understood, it has, as already observed, been said, that no averment as to their meaning is necessary (b). This doctrine seems nevertheless a little extraordinary, since, without such an explanation, the question of law does not appear open upon the record (c). Suppose for instance, an action to be brought for calling the plaintiff *Idoner* (d), without any aver-

2 B. & A. 685, the declaration alleged that, before the publication of the libel, a carriage in which E. S. was riding, was passing on a certain highway, and that the plaintiff was also driving another carriage, and that it happened without any negligence, default, or furious driving on the part of the plaintiff, that the two carriages came in contact together, whereby the carriage in which the said E. S. was riding, was accidentally overturned, and the said E. S. was injured, and that the defendant published a libel of and concerning the plaintiff, and of and concerning the said accident. The jury found, on an issue taken on a special justification to part of the alleged libels, that the accident had been occasioned by the hard and furious driving of the plaintiff, and found a verdict with £50 damages as to the other part of the libels which was not justified ; upon a motion to enter a verdict for the defendant, on all the issues, it was contended that the allegation that it happened without furious driving on the part of the plaintiff, was part of the description of the accident. But the court held that the averments were divisible, and that the allegation was no part of the description of the accident.

(a) *Hall v. Smith*, 1 M. & S. 287.

(b) See 1 Will. Saund. n. 242.

(c) *Hob. 126.* 1 Roll. Ab. 86. *Zenobio v. Axtel*, 6 T. R. 162.

(d) In *Welch* signifying perjured.

ment of the meaning of the term, and that the defendant demurred; since an acquaintance with the Welch tongue forms no part of legal education or practice, the judges would be placed in a strange situation if they were bound to give their judgment upon the legal meaning of the words; but an averment, as *to [*412] the meaning, would preclude all doubt, since, by his demurrer, the defendant would allow that the meaning of the word was *perjured* or *forsworn*, as alleged in the declaration, and judgment would be given accordingly.

If the plaintiff undertake to translate, and render a foreign word of an actionable sense, by an English one whose meaning is not actionable, the declaration will be defective.

In the case of *Ross v. Lawrence*, the plaintiff averred that the Welch words *Deid ingues Will. Ross in mudon*, signified that the plaintiff was *forsworn*, though in fact they signified that he was *perjured*; and, after a verdict for the plaintiff, judgment was arrested (*e*).

In an action for slander of the plaintiff's title, it is sufficient to aver his right generally, without setting forth his title. Thus it has been held to be sufficient to aver that the plaintiff was lawfully possessed of certain copper mines, situate, &c. and of certain ore gotten and to be gotten from the said mines, &c. (*f*).

In the next place it is necessary to connect the publication with the previous facts, by means of an appropriate averment (*g*).

Where the words are actionable, affecting the plaintiff *in a special character, an averment that they were [*313] applied to him in that particular character is necessary (*h*), unless that application necessarily appear from the words themselves; in which case, the general allegation that they were spoken concerning the plaintiff, is sufficient.

(*e*) Sty. 263. *Ross v. Lawrence*. (*f*) *Rowe v. Roach*, 1 M. & S. 304.

(*g*) To avoid circumlocution, the term colloquium is frequently used, not in its strict sense as denoting a conversation on the subject of the matters previously averred, but as a general averment, that the publication was made of and concerning those facts.

(*h*) *Savage v. Robery*, 2 Salk. 694. *Savile v. Jardine*, 2 H. Bl. 531. *Burnett v. Wells*, 12 Mod. 420. Str. 1169. 3 Salk. 326. Ld. Ray. 610. 8 Mod. 271. Cro. Car. 417.

The defendant said of a tradesman (*i*), "He is a sorry pitiful fellow, and a rogue; he compounded his debts at five shillings in the pound;" and the declaration was held to be good, without an express colloquium of the trade.

So, where the words published of a tradesman (*k*) were, "Have a care of him, do not deal with him, he is a cheat, and will cheat you; he has cheated all the farmers at Epping, and dares not shew his face there, and now he is come to cheat at Hatfield." And the court said, the words themselves supply a colloquium; they appear to be spoken of his trade.

So, where the words spoken of a justice of the peace [*414] were, "I have been often with Sir John *Isham for justice, but could never get any thing at his hands but injustice;" it was held that the words were actionable without any colloquium, and that the court would intend that the words were spoken of him as a justice, and not as a private man (*l*).

So, where the defendant said of an attorney, "He is a common barretor;" it was held to be unnecessary to aver that the words were spoken of the plaintiff in his profession, for the court would intend it, and that the words were to be construed *secundum conditionem personarum* of whom they were spoken.

So, where (*m*) the words spoken to a merchant were, "He is not worth a groat, he is £100 worse than nought."

So, where the defendant said to a physician (*n*), "Thou art a drunken fool and an ass; thou wert never a scholar, and art not worthy to speak to a scholar;" the words were held to be actionable, though no colloquium was laid of the plaintiff's profession.

In general, where facts extrinsic of the words and of the plaintiff's character are necessary to support the action, the [*415] plaintiff must aver that *the publication was made in reference to those facts.

The declaration (*o*) stated that the plaintiff, a constable of D., was sworn before the justices at their quarter sessions concerning an

(*i*) Lord Raymond, 1480. *Stanton v. Smith*.

(*k*) 2 Lev. 62.

(*l*) Cro. Car. 15. 192. 459. Cro. J. 557. 1 Lev. 280.

(*m*) Cro. Car. 265.

(*n*) Cro. Car. 270.

(*o*) *Drake v. Corderoy*, in error, Cro Car. 288.

affray made by the defendant upon one F. and that the defendant then and there in the said court and in the presence of the justices, said, he (innuendo the plaintiff) is forsworn, and it was held, that the declaration was bad without a colloquium of the oath so taken, because it was necessary for the declaration to shew that the words intended a false oath in a court of record.

The declaration (*p*) stated, that the plaintiff had put in an answer upon oath to a certain bill filed against him in the court of exchequer by the defendant, and that the latter in a certain discourse which he then and there had with one R. W., the plaintiff's servant said, "I have no doubt you will forswear yourself, as well as your master (the plaintiff) has done, before you," meaning and insinuating thereby that the plaintiff had perjured himself in what he had sworn in his aforesaid answer to the said bill so filed against him as aforesaid.

In another count, the words spoken by the defendant *to the said R. W. the plaintiff's servant, *were laid thus: "Your master (meaning the plaintiff) has both cheated people [*416] out of their wages, and forsworn himself;" thereby meaning that the said plaintiff had perjured himself in the aforesaid answer, so put in by him to the bill so filed against him as aforesaid. It was held, after verdict, that both these counts were bad, on the ground that there was no colloquium laid of the plaintiff's answer to the bill in chancery, and that it did not appear that the words were spoken in relation to that answer, and that without such an averment the innuendo was unwarranted.

And in general, as prefatory averment of the defendant's intention to injure the plaintiff, or to impute a particular charge, though it be coupled with a subsequent innuendo to the same effect, will not supply the want of an express averment, that the words were spoken, or libel published of and concerning the plaintiff, or other subject matter which is essential to the slander (*q*).

(*p*) *Hawkes v. Hawkey*, 8 East. 427.

(*q*) *R. v. Marsden*, 4 M. & S. 164, where it was held to be insufficient in an indictment, to aver that the defendant published the libel with intent to vilify the prosecutor, &c. without an express averment that the libel was published

[*417] *The averment ought to extend to the whole of the prefatory matter necessary to render the words actionable. The plaintiff (*r*) declared, that some evil persons unknown, had feloniously shorn the sheep of C., and that there being a communication between the defendant and another, *concerning the shearing of those sheep*, the defendant said, "I do not know who did shear the sheep;" and being asked who it was, he replied, that it was the plaintiff, *innuendo felonice*, and Houghton and Doderige, Justices, against the opinion of Croke, J. held, that the words were not actionable, since the colloquium was of the shearing of the sheep only, and not of the felony.

It has already been seen that the danger of a variance may often be incurred by the indiscreet averment of too much prefatory matter, and an improper application of the words or libel to such facts. It is, however, to be observed, that although more than is necessary be previously alleged, yet that if the colloquium or averment apply the words or libel to so much only of the previous matter as is proper and necessary, a variance in not proving the rest will not be material.

Thus, where the plaintiff averred that he followed two trades, and that the defendant, intending to injure him in those several trades, in a certain *discourse which he had of and concerning the said plaintiff in one of his trades, spoke the words set out, it was held that though the plaintiff failed in proving that he followed both trades, yet that, having proved that he followed the trade concerning which the words were alleged to have been spoken, he was entitled to recover (*s*).

INNUENDO.

Next, with respect to the nature and office of an innuendo. An of and concerning the prosecutor, although the libellous expressions were directly applied to him by means of an innuendo. And see *Johnson v. Aylmer*, Cro J. 126. *Lowfield v. Bancroft*, Str. 924. *R. v. Alderton*, Say. 180.

(*r*) 3 Buls. 83. *Helly v. Hender*.

(*s*) *Figgins v. Cogswell*, 3 M. & S. 369. Note that this was previous to the case of *Lewis v. Walter*, 3 B. & C. 138, where it was held that such an averment is divisible.

innuendo may be defined to be an averment which explains the meaning of the defendant's publication by reference to facts previously ascertained by averment or otherwise (*t*).

An innuendo is frequently necessary, where the language of the defendant is apparently innocent and inoffensive, but where, nevertheless, by virtue of its connection with known collateral circumstances, it conveys a latent and injurious imputation.

Where from the ambiguity of the defendant's expressions, it is doubtful who was meant, it is the proper office of the innuendo to render the allusion clear, by specifically pointing out the meaning. As where but one or two letters of the *name [**419*] are expressed, or the plaintiff is libelled under a fictitious or borrowed name, or where the libel is couched under a fable or allegory, whose tendency and meaning it is necessary to explain by reference. Thus in the case of *Sir Miles Fleetwood v. Curl* (*u*), the plaintiff was receiver of the court of wards, and the words were laid in the declaration, with an innuendo, as follows: "Mr. *Deceiver* (meaning the plaintiff) hath deceived the king." It was assigned for error, that the innuendo could not be supported, but the court held that it was well applied.

So in an information against Clerk (*x*), for publishing a libel in "Mist's Journal," it was shewn by proper averments and innuendos, that in a pretended piece of Persian history, the king and several other members of the royal family had been libelled, and that the king was represented under that of the name of Merewits, the Queen under that of Sultana, and that the character of the young Sophia was intended for the Pretender.

In Baxter's case (*y*), it was shewn that by the word Bishops, the Bishops of England (*z*) were meant; in the *King v. Franklin*, that by "ministers," *were meant the ministers of the King of England (*a*). [**420*]

In an action for charging the plaintiff with having said that he

(*t*) 2 Salk. 513. 1 Lord Ray. 256. 12 Mod. 139. 1 Will. Saund. 243.

(*u*) Cro. J. 557. 2 Roll. Rep. 148.

(*x*) Barnard K. B. 304. Dig. L. L. 24.

(*z*) 3 Bac. Ab. 454.

(*y*) 3 Mod. 69.

(*a*) 11 Mod. 99.

could see no probability of the war's ending with France until the little gentleman on the other side of the water (innuendo the Prince of Wales) was restored to his rights, the court held, that this was certain enough, even without an innuendo.

In *Tutchin's case* (*b*), the introductory part of the information stated, that the libel was written concerning the royal navy of this kingdom, and the government of the said navy. One part of the libel was, "The mismanagements of the navy (innuendo the royal navy of this kingdom) have been a greater tax upon the merchants than the duties raised by parliament." And it was held, that, "the navy" was well connected, by means of the innuendo, with the royal navy mentioned in the introductory part.

In the *King v. Mathews* (*c*), the information in the introductory part charged the libel to have been written "Of and concerning the Pretender, and concerning his right to the crown of Great Britain."

[*421] The words of the libel were, "From the solemnity *of the Chevalier's birth, and if hereditary right be any recommendation, he has that to plead in his favour." And it was held that the innuendos in the body of the libel, explaining the words to mean the Pretender, and his hereditary right to the crown of Great Britain, were, when connected with the previous averments, sufficient to verify the charge.

The most important rule of law relating to this species of averment is, that its office is merely to explain by pointing out the defendant's allusion, and that it can in no case be allowed to introduce new matter. And the reason for this is a most substantial one; for were it otherwise, there would be no sufficient and distinct averment of the existence of those facts which in point of law are essential to render the words actionable. For instance, suppose the defendant had said, "You are forsworn," which words would not be actionable, unless spoken (*d*) with reference to a judicial oath, if the plaintiff averred by way of innuendo, and without reference to antecedent matter, meaning thereby "that he the said plaintiff was forsworn in a court

(*b*) 5 St. T. 590. 3 Ann. 1704.

(*c*) 9 St. T. R. 682.

(*d*) *Holt v. Scholefield*, 6 T. R. 691.

of record," or meaning thereby " that he the said plaintiff was perjured ;" the averment would involve a question of law, and the jury would have to decide upon *evidence, whether [*422] the forswearing did in law amount to perjury, and the question would not be open to the court upon the record ; and besides this, that clearness and precision would be wanting which is essential to a legal and technical statement of the case.

In the *King v. Horne (e)*, De Grey, C. J. observed, " In the case of a libel, which does not in itself contain the crime without some extrinsic aid, it is necessary that it should be put upon the record by way of introduction, if it is new matter ; or by way of innuendo, if it is only matter of explanation. For an innuendo means no more than the words '*id est*,' '*scilicet*,' or ' meaning,' or ' aforesaid,' as explanatory of a subject matter sufficiently expressed before ; as such a one, meaning the defendant, or such a subject, meaning the subject in question."

An innuendo, therefore, cannot extend the sense of the words beyond their own meaning, unless something be put upon the record for it to explain [1].

As, in an action upon the case against a man, for saying of another (*f*) " He has burnt my barn ;" the plaintiff cannot there say, " innuendo a barn with corn," because that is not *an explanation of what was said before, but an addition [*423] to it.

But if, in the introduction, it had been averred that the defendant had a barn full of corn, and that in a discourse about that barn, the defendant had spoken the words charged in the declaration of the plaintiff, an innuendo of its being the barn full of corn would have been good ; for, by coupling the innuendo in the libel with the introductory averment, " his barn full of corn," it would have made the sense complete.

An innuendo can in no case supply the want of a proper colloquium.

(*e*) 2 Cowp. 683.

(*f*) Barham's case, 4 Co. 20.

[1] Recognized in *Van Vechten v. Hopkins*, 5 Johns. R. 220 ; *McClaaghry v. Wetmore*, 6 Id. 83 ; and *Thomas v. Croswell*, 7 Id. 271.

The plaintiff (*g*), in the first count, laid these words as spoken by the defendant, "John Holt (meaning the plaintiff) has forsworn himself, (meaning that the plaintiff had committed wilful and corrupt perjury)." After a general verdict for the plaintiff with entire damages, judgment was arrested, on the ground that the words in the first count were not in themselves actionable, and that the count contained no colloquium or averment of the words having been spoken of a forswearing in a court of justice, and the innuendo could not extend their meaning.

[*424] In the case of the *King v. Alderton* (*h*) the *alleged libel was contained in an advertisement, reciting certain orders made for collecting money, on account of the distemper among the horned catle, advertised by the clerk of the peace for the county of Suffolk; and it charged, that by these orders the money collected had been improperly applied. The information stated this to be a libel upon the justices of Suffolk. In the body of the libel it was not said, "by the order of the justices," nor did the information in the introductory part say that it was a libel of and concerning the justices of Suffolk. But when the information came to state any of the orders in the advertisement, it added this innuendo, "meaning an order of the justices of peace for the county of Suffolk" but these innuendos could not (it was held) supply the want of an averment in the introductory part, of its having been written "of and concerning the justices," because they were not explanatory of, but in addition to the former matter. And the court were of opinion that the information having omitted the words "of and concerning the justices" in the introductory part, such omission was fatal, and judgment was accordingly arrested.

In the case of *Hawkes v. Hawkey* (*i*), already referred to, it was decided that where the introductory *matter has been properly stated, it is necessary to connect the whole publication with it by means of a general averment that it related to such previous matter, and that it was not sufficient to do it by means of an innuendo only.

(*g*) *Holt v. Scholefield*, 6 T. R. 691.

(*h*) *Say. R.* 280.

(*i*) 8 *East*. 427.

Upon motion in arrest of judgment, Lord Ellenborough, C. J. was of opinion, that it might be collected from what Lord C. J. Do Grey said, in the case of the *King v. Horne*, speaking of Barham's case (*k*), that he conceived an introductory averment that the defendant had a barn full of corn, *and also* an averment that the defendant spoke the words in a discourse concerning that barn, necessary to warrant the innuendo "my barn full of corn." His Lordship added, "If a broad rule has been laid down as to the mode of declaring, in this species of action, whether properly laid down or not, in the first instance, it is better to abide by it, than to attempt making nice distinctions. The only peculiarity in this case which is relied upon, as distinguishing it from the current of authorities is, the preliminary matter averred respecting the fact of the plaintiff having put in his answer to the bill filed in the exchequer; and the question is whether the innuendo alone will refer the words spoken to such introductory matter so as to make it necessary for *the plaintiff to prove any thing which he must [*426] have proved had a colloquium been laid; the case of *Savage v. Robery* seems to show that it will not."

And the court (*l*), after considering the case of the *King v. Horne*, gave judgment for the defendant.

In many instances, however, an innuendo will not vitiate the proceedings, though new matter be introduced [*a a*].

As, where the matter is superfluous, and the cause of action is complete without it.

The plaintiff alleged (*m*), that the defendant addressed these words to him, "Thou art a rogue and a rascal, and hast killed thy wife; innuendo one Elizabeth, late wife of the plaintiff." And the plaintiff had judgment, though the declaration contained no prefatory averment that the wife was dead.

In *Shalmer v. Foster and his wife* (*n*), the declaration stated that the wife of the defendant spake of the aforesaid plaintiff to

(*k*) 4 Co. 20.

(*l*) Cowp. 680.

(*a a*) See Archbishop of Tuam *v. Robeson*, 5 Bingham 17. See also p. 342 *supra*, note [*a a*].

(*m*) Wilner *v. Hold*, Cro. Car. 489.

(*n*) Cro. Car. 496.

Ann Rochester, the plaintiff's mother, these words: "Where is that lying thiefe, thy son (innuendo the plaintiff), he hath murdered my aunt (innuendo one Dorothy Stoke, the defendants's [*427] aunt), and I will prove *it." After verdict for the plaintiff, though a motion was made in arrest of judgment upon another ground, no objection was taken to the innuendo of the plaintiff's aunt.

So, where the words were laid (*o*), "Thou hast robbed the church" (innuendo the church of St. Alphage), no objection was taken.

In *Craft v. Boite* (*p*), the words, as laid in the declaration, were, "He (meaning the plaintiff) hath stolen two hundred pounds worth of plate out of Wadham College," (meaning a college called Wadham College, in the University of Oxford,) though the declaration contained no previous averment of Wadham College, in the University of Oxford. It is suggested by the learned editor of Saunders' Reports, that the innuendo is on such account improper; the objection, however, appears to be rather of form than of substance; and probably such a declaration would be held to be good, on general demurrer or after verdict, since the gist of the action is the charge of stealing from Wadham College, which is entirely unconnected with the situation of the college in the University of Oxford, so that the innuendo might be expunged without affecting the cause of action.

*In *Roberts v. Cambden* (*q*), the defendant said, "He [*428] (meaning the plaintiff) is under a charge of a prosecution for perjury. G. W. had the attorney-general's directions to prosecute;" and an innuendo that the attorney-general for the county palatine of Chester was meant, was rejected as surplusage.

An innuendo, when repugnant or insensible, may be rejected (*r*).

The record of *Nisi Prius* stated, that the said William spoke of the said James these scandalous words following: "He (innuendo

(*o*) Cro. J. 153. 1 Vin. Ab. 512.

(*p*) 1 Will. Saun. 243.

(*q*) 9 East. 93.

(*r*) Cro. Car. 512. See also *R. v. Aylett*, 1 T. R. 63, where door was by the innuendo explained to mean outer door.

the said *William*) is a thief," where the innuendo should have been of James. After a verdict for the plaintiff it was held that he was entitled to his judgment, since the innuendo was void, and an apparent misprision.

It does not, in any case, seem necessary that the innuendo should in terms state the legal inference which is to be drawn from the publication, as connected with the facts stated; its office seems more properly confined to mere reference of the defendant's meaning to previous matter; and, indeed, such an averment would be improper, since the actionable nature of the charge is a matter of law, which the court will collect from *the facts, if [*429] they warrant such a conclusion; and if they do not, no innuendo of their legal effect will avail to render them actionable.

Thus, where, from the circumstances, it appears upon the whole that the defendant intended to impute a charge of wilful murder, it is unnecessary for the plaintiff to assert, by way of innuendo, that the defendant meant to impute the very crime of murder.

In *Peake v. Oldham (s)*, in error, the plaintiffs declared, that upon a colloquium concerning the death of one Daniel Dolly, the defendant said to the plaintiff, "You are a bad man, and I am thoroughly convinced that you are guilty (meaning guilty of the death of the said Dolly,) and rather than that you should want a hangman, I will hang you."

After a general verdict with damages, the defendant brought a writ of error. Judgment however, was affirmed, though the count alluded to contained no express allegation, by way of innuendo or otherwise, that the defendant intended to charge the plaintiff with the crime of murder.

And though in the above case special damage was laid, it appears that the court held the words to be in themselves actionable; and Lord Mansfield observed, "These words plainly show what *species of death the defendant meant, and [*430] therefore manifestly in themselves import a charge of murder." On the contrary, if the plaintiff undertakes to explain the import of the words, by specifying the particular imputation

(s) 1 Cowp. 275.

intended by the defendant, such explanation will not vitiate the declaration, provided such an intention can be collected from the circumstances. Thus, in the case last alluded to, where a colloquium was laid concerning the *death* of Daniel Dolly, the plaintiff, in his fifth count, laid the words, "You are guilty," (innuendo of the murder of D. D.) and the count was held good after verdict, though the colloquium was of the death only, and the innuendo of the murder (*t*).

An innuendo in one count may be supported by a colloquium in a previous one. In *Tindall v. Moore* (*u*), the words laid in the first count were, "That rogue Joe Tindall (meaning the plaintiff) set the house on fire," meaning the summer-house that was burnt in the occupation of one Mr. Cotten. In the fifth count the words were, "Joe Tindall (meaning the plaintiff) set the house on fire," (meaning the same house). It was moved, in arrest of judgment, that the words in the last count were not actionable, [*431] for *that every count in a declaration is a substantive count, and that the innuendo (meaning the same house) could not relate to the summer-house mentioned in the first set of words. But by the court, although the last set of words be not of themselves actionable, yet they shall have relation to the former set.

From these decisions it appears, that the colloquium and innuendo are averments, whose office it is to connect the defendant's publication with the prefatory matter.

That the first is a general averment, connecting the whole of the publication with the previous statement; the latter a subordinate averment connecting particular parts of the publication with what has gone before, in order to elucidate the defendant's meaning more fully.

That the want of colloquium cannot be supplied by an innuendo.

That the office of the innuendo is confined to a simple explanation of the defendant's meaning by reference to previous matter. That it cannot, in any case, supply the want of prefatory averments and of a colloquium, in order either to explain or extend the mean-

(*t*) See also *Woolnoth v. Meadows*, 5 East. 463, and *Dame Morrison v. Cade*, Cro. J. 162.

(*u*) 2 Wils. 114.

ing of the words or libel set out, where such an explanation or extension, with reference to extrinsic matter, is necessary.

It would not be easy, or perhaps possible, to point out a more clear and convenient process *for technically stating a case upon the record, than this, which has with great [*432] wisdom been adopted by the law from very early times ; it combines simplicity with precision, separating the law from the facts, and exhibiting a statement of the cause of action on the face of the record, plain and distinct in all its parts.

It is true that, in some instances, justice may be defeated from want of attention to the maxims which regulate this kind of statement ; but it is equally true, that this cannot happen without faulty inattention to a few plain and rational rules, and that the failure might have been prevented by the exertion of a moderate share of prudence, aided by a very small stock of legal knowledge ; and that, on the other hand, the general advantages, in point of perspicuity and legal precision which result from an adherence to these rules, are too great to be placed in competition with the rare and partial inconvenience arising from ignorance or inattention.

*AVERMENT OF MALICE.

NEXT, as to the averment of the defendant's intention. [*433]

Malice either in law or fact is essential to the action, and, consequently, a corresponding allegation is essential to a complete declaration.

No precise and prescribed form of words is requisite for this purpose, though the term *malicious*, as applied to the matter published, and *maliciously* to the act of publishing, are the most usual and appropriate terms (a).

Any form of words will suffice from which the malicious intent can be inferred ; thus it has been held to be sufficient to aver, that the defendant spoke the words or published the libel falsely or

(a) As to the limited and technical sense in which malice is used as descriptive of this species of injury, vide *supra* 3, 209, 292, and *infra* 454.

wrongfully (*b*), or that the defendant *machinans pejorare dixit* (*c*).

And Rolle, C. J. (*d*) was of opinion, that in a declaration it is not necessary to use either the words *falsely* or *maliciously*, though it is otherwise in case of an indictment or information. But it is suggested by Mr. Serjeant Williams, in his *notes on [*434] Saunders (*e*), that this must be taken to mean that the omission would not be fatal after verdict.

But such words, it seems, are essential in indictments and informations (*f*).

It has been the fashion with pleaders, both ancient and modern, to deal so profusely in the evil motives and intentions attributable to the defendant, that few cases are to be met with where any objection has been taken, for want of an averment of this nature.

It does not appear to be necessary (*f*) for the plaintiff to make any averment by way of exculpation, since it is incumbent on the defendant, in case he mean to rely on the justice of the charge in his defence, to plead the justification specially, and he cannot give it in evidence under the general issue.

And perhaps the averment of innocence, on the part of the plaintiff, of the charge cast upon him, or of the falsity of the defendant's publication, would be considered as unnecessary, on account of the general presumption which the law entertains of a man's innocence till the contrary be made to appear. Formerly, however, it was held to be incumbent upon the plaintiff not only to [*435] *aver the falsity of the charge in general terms, but also to negative particular facts contained in the publication complained of; for instance, where the slander was published as heard from another (*g*), it was held to be necessary to aver that the defendant had not heard it.

But in *Hooker v. Tucker* (*h*), it was held by Holt, C. J. that in

(*b*) Moor 459. Ow. 51 Noy. 35.

(*c*) Danv. 166. Com. Dig. tit. Defamation, G. 5.

(*d*) Sty. 392.

(*e*) 2 Will. Saund. 242.

(*f*) Sty. 392. Per Roll. C. J. 1 Vin. Ab. 533, pl. 3.

(*f*) 2 Wils. 147.

(*g*) Morrison's case, Sheppard Ac. 267.

(*h*) Holt. R. 39.

a declaration for these words of a trader, "He is a pitiful fellow, and not able to pay his debts," there needed no averment that he was no pitiful fellow, and that he was able to pay his debts.

So, in *Bendish v. Lindsey* (i), where the action was brought for charging the plaintiff with bribery at an election, the defendant, holding up some guineas in his hand, said of the plaintiff, who was a candidate, "These guineas are Mr. Bendish's money, and were given me to vote for him; he has bought my vote, and he shall have it." It was objected in arrest of judgment, after verdict for the plaintiff, that it was not averred throughout the whole pleading, that the plaintiff did not give the money. But Holt, C. J. said, it need not be averred that the plaintiff did not give the money, for it is said, *hæc falsa facta malitiosa verba*, which is well enough.

*The falsity of the charge may be implied from the [*436] averment that it was made *ex malitiâ*, since the term, in its legal sense, imports a publication without legal excuse (k).

Where a party repeats the slander of another, knowing it to be false, and that the author has retracted his assertion or opinion, it seems that an action is maintainable against the reporter, though at the time of publication, he announced the name of the person from whom he heard it; but in such case, it would be proper to aver the defendant's knowledge in the declaration; for, if the fact were not to be averred in the declaration, and the defendant pleaded that he gave the plaintiff a cause of action by naming his author, the plaintiff might be considered as precluded from replying that the defendant maliciously published the slander against his own knowledge and conviction; for if he could reply it, issue must necessarily be joined upon the fact of knowledge, which, as has been held, is not traversable.

Thus, in the case of *Sir G. Gerrard v. Dickenson* (l), the action was brought for publishing a lease, knowing it to be counterfeit, and thereby *hindering the plaintiff from [*437] letting his land; the defendant pleaded, that she found

(i) 11 Mod. 194.

(k) *Johnson v. Sutton*, 1 T. R. 493. Cro. Car. 271. Supra 3, 209, 292. Infra 454.

(l) 4 Rep. 18.

the lease, and traversed her *knowledge* of the forgery ; and the plea was held to be insufficient, because the knowledge of the forgery is not traversable, any more than the *scienter* in an action on the case, where the defendant's dog has bit the plaintiff's cattle, and where the plaintiff avers that the defendant *knew* that the dog was accustomed to bite sheep. The objection to traversing the *scienter* which has been assigned, is, that it is no direct allegation, nor ever alleged in any *place*, and therefore cannot be tried (*m*). This objection, on the score of locality, ceased indeed when it was no longer required that the venire should be awarded from the vicinage ; and there seems to be no very satisfactory reason why a party in pleading should not confine the evidence by traversing any distinct circumstance which is essential to his adversary's case, and which must be proved upon the trial. Since, however, the technical objection to traversing the *scienter* has not been judicially defeated, it would not be proper to omit the averment of knowledge in the declaration, in a case where it is material ; as, where a party has repeated [1] slander, knowing the author to have been convinced of his error, or sets up a lease which he knows to be a forgery, for the purpose of injuring the plaintiff.

[*438] *Where particular circumstances have been introduced, to shew the defendant's conduct to have been malicious, it will be necessary to prove them upon the defendant's pleading the general issue (*n*).

It is sometimes advisable, and perhaps necessary, to allege the malicious intention in particular with which the defendant uttered the words or published the libel. Thus it may be necessary, in an indictment or information, to allege that he did so with intent to provoke another to commit a breach of the peace (*o*), or with intent to defame a particular class of persons, or to bring the administration of justice into contempt. Where a libel has been alleged

(*m*) 4 Rep. 18.

(*n*) 2 East. 437.

(*o*) See *R. v. Wegener*, Starkie's C. Where Abbott, C. J. held, that a libel written to an attorney and containing reflections on his professional character, was not indictable without an allegation, that it was written with intent to provoke him to commit a breach of the peace.

[1] See note [1]. p. 340, *supra*.

to have been published with several intentions, which are in their own nature distinct and divisible, it will be sufficient to prove that the fact was done with any one of such different intentions, provided the publishing the particular matter with that intention be criminal.

Thus, where a libel was alleged to have been published with intent to bring the administration of justice into contempt, and also to defame particular magistrates, it was *held, [*439] that the defendant was liable to be convicted, if a publication, with either of those intentions, was proved (*p*).

Next, as to the statement of the loss or damage to the plaintiff resulting from the wrongful act of the defendant.

Where the words are intrinsically actionable, the loss to the plaintiff is, as has been seen, a mere inference or presumption of law; and it does not seem to be necessary for the plaintiff to aver that the words complained of amount to the charging of a precise crime; for their actionable quality is a question of law, and not of fact, and will be collected by the court from the circumstances, if they warrant it (*q*). But in such case, it may frequently be advisable to aver special damage to have been sustained in consequence of the words; such an averment will not prejudice, since it will not be necessary to prove it on the trial. If no such proof be then given, and the jury give a general verdict, the defendant, if it should be necessary afterwards in order to enable him to move in arrest of judgment, may have the verdict amended by confining (*r*) it *to the actionable words according to the judge's [*440] notes.

Formerly it was held (*s*) that, where the words were not actionable, but the special damage was the gist of the proceeding, such special damage might be given in evidence, although the particular instances of the special damage were not stated in the declaration;

(*p*) *R. v. Evans*, Cor. Bayley, J. Lanc. sp. assizes, 1821. See also *R. v. Dawson*, Cor. Holroyd, J. York summer assizes, 1821. Starkie on Evidence, iv. 15. 86.

(*q*) See *Peake v. Oldham*, Cowp. Rep. 275.

(*r*) This is done at chambers, as of course, without a motion in court. The application must be made to the judge who tried the cause (if at the assizes, though the record is one of another court).

(*s*) *Browning v. Newman*, 1 Str. 666.

but that, when the words themselves were actionable, particular instances of such damage could not be given in evidence, unless specified on the record.

But the modern practice (*t*) does not warrant this distinction, and at the present day it seems that in both cases the particular damage must be specified [1].

The general rule of pleading, as to special damage, is, that it must be averred with that degree of certainty and particularity which the case admits of, in order that the defendant may be apprized what it is he comes to answer, though in some cases where particularity would be productive of inconvenience, and the circumstances are not immediately within the knowledge of the party, a more general statement has been deemed to be sufficient.

[*441] *Thus the averring generally, that by means of the publication, several customers (not naming them) left the plaintiff's house, is not sufficiently precise (*u*).

And so, where the alleged damage consists in loss of marriage (*x*), the plaintiff must point out the individual with whom the marriage would otherwise have been contracted.

And for the same reason, where the plaintiff states a marriage with J. N. to have been hindered, he cannot afterwards give in evidence loss of marriage with any other person (*y*).

But it has been said, that greater certainty is requisite where the special damage is the gist of the action, than where it is merely laid by way of aggravation (*z*).

Where the special damage consists in the (*a*) plaintiff's having been prevented from disposing of, or selling his estate, it is necessary to shew how he was prevented, as that he had taken some steps for the purpose of selling, and that the bidding was stopt by the defend-

(*t*) B. N. P. 7. 1 Will. Saund. 243. n. 5. Str. 666.

(*u*) B. N. P. 7. 1 Roll. Abr. 58. 8 T. R. 130.

(*x*) 1 Sid. 396. 1 Vent. 4. Cro. J. 499. 12 Mod. 597.

(*y*) Lord Ray. 1007.

(*z*) Per Cur. in *Wetherell v. Clarkson*, 12 Mod. 597. 2 Lut. 1295.

(*a*) *Smead v. Badley*, Cro. J. 397. Sir W. Jones, 196.

[1] Same doctrine held in *Herrick v. Lapham*, 10 Johns. 281; *Hersh v. Ringwalt*, 3 Yeates 508.

dant's act; but it is unnecessary to specify the names of any of the bidders.

*Where the plaintiff (*b*), who had been a preacher in a chapel to a dissenting congregation, averred generally [*442] in the declaration, that by reason of the words the persons who frequented the said chapel had refused to permit him to preach there, and had discontinued giving him the gains and profits which they had usually given, and otherwise would have given; the court held, on motion in arrest of judgment, that where a plaintiff brings an action for slander, by which he lost his customers in trade, he ought, in his declaration, to state the names of those customers, in order that the defendant may be enabled to meet the charge, if it be false; but that in the principal case, the plaintiff could not have stated the names of all his congregation, and that it was sufficient to say that he had been removed from his office, and had lost the emoluments of it (*e*).

Where actionable words are spoken, within the scope of a private jurisdiction, the declaration may allege a consequential loss of customers at a place beyond the limits of such jurisdiction. For the allegation is only in respect of damages to increase them, and may be inquired of in any place whatsoever (*d*).

*Where the words are in themselves actionable, and the particular character of the plaintiff is stated in aggravation, it is not necessary to state the circumstances of that situation with so great certainty as where it is essential to the action. Thus, where the words are spoken of a candidate to serve in parliament, it is sufficient to state the fact generally, and it is unnecessary to set forth the writ to the sheriff (*e*).

In general (*f*), the place where the words are spoken is immaterial; yet, it has been said that if the plaintiff state the place by way of aggravation, and not merely as venue, he will be bound to prove the speaking to have been in the place named.

(*b*) *Hartley v. Herring*, 8 T. R. 130.

(*c*) 4 Burr. 2424.

(*d*) *Ireland v. Blockwell* in error, Cro. C. 570.

(*e*) *Harwood v. Sir J. Astley*, 1 N. R. 47.

(*f*) B. N. P. 5. tamen qu. & vid. *Starkie on Evidence*, tit. *Variance*. Place

With respect to joining different injuries in the same proceeding, words spoken at different times may be included in the same count.

In such case, however, if it should appear on the face of the count that the words were spoken at different times, and that some of them were not actionable, judgment would be arrested, if entire damages were given for the whole count.

And a count for oral slander (*g*) may be joined with a count for a libel in the same declaration. *And the imposing *crimen felonæ* and causing (*h*) a plaintiff to be brought before a magistrate may be joined with a complaint for a malicious accusation before the magistrate.

If the plaintiff recover, he cannot, it seems, afterwards recover in respect of any special damage which accrued subsequently from the speaking of the same words (*i*).

Where the words are intrinsically actionable, special damage, though averred, need not be proved (*k*).

In the proceeding by writ of scandalum magnatum, the plaintiff declares *tam pro domino rege quam pro seipso* (*l*), though he is entitled to the whole of the damages recovered.

It has been held (*m*), that the statute 2 R. 2. st. 1. c. 5, is a general law, and that the plaintiff need not recite it in his declaration; but that if he undertake to recite it and vary from it in any material point, the declaration will be bad.

Where a charge has been falsely and maliciously made [*445] in a judicial form, the plaintiff, as has been *seen, cannot declare simply on the slander (*n*), but must found his action on the particular circumstances of the case. The declaration must shew,

(*g*) King. v. Waring and uxor, 5 Esp. C. 13.

(*h*) Cro. Car. 271. Note that the court held that the charge before the magistrate was not in the nature of a conspiracy, but was an aggravation of the false and malicious accusation.

(*i*) B. N. P. 7. tamen qu. & vid. 2 Mod. 151, contra.

(*k*) Cook v. Field, 3 Esp. C. 133. (*l*) 6 Bac. Ab. 100. 1 P. Will. 690.

(*m*) 4 Co. 12 b. Cro. Car. 136. Com. Dig. Defam. B. 3.

(*n*) Vide supra 276, and it seems that in general where the action is not maintainable, unless the act be done maliciously and without probable cause,

1st. A prosecution instituted and determined.

2dly. That the defendant acted maliciously and without probable cause in the prosecution of a false charge.

3dly. The damage resulting to the plaintiff.

1st. A prosecution instituted by the defendant and since determined.

The fact of the prosecution must of course be alleged according to the particular circumstances.

Where the prosecution was by preferring a bill of indictment, which was found to be a true bill, the declaration may state that the defendant indicted, and caused and procured to be indicted, the said plaintiff, and the material parts should be set out. But where the jury have thrown out the bill, it should be described as a *bill* and not as an *indictment* (*o*).

Formerly it was held to be necessary to shew, that the prosecution was instituted before a court of competent jurisdiction, to try the supposed offender *for the offence imputed (*p*). [*446] But it seems to be now settled, that an action on the case may be supported for an arrest, though the court from which the process issued had no jurisdiction (*q*), and that an action may be supported for a malicious prosecution of a defective indictment, and, therefore, at this day, it does not appear to be necessary to make any averment (*r*) as to the competency of the court.

And it has been held, that the style of the court need not be exactly copied (*s*).

the declaration ought to aver the special circumstances and allege the malice and want of probable cause.

(*o*) Com. Dig. Ind. B. 5 Taunt. 187. 1 Salk. 376.

(*p*) Com. Dig. Action on the case for a conspiracy. C. 4. Rol. Ab. Action sur case 50.

(*q*) 2 Wils 302.

(*r*) 4 T. R. 247. 2 Str. 691. 1 Salk. 15. Such an action lies in respect of a malicious charge in the Ecclesiastical Court. Gibs. 216. Bunb. 217. Burn's Ecc. Law. tit. Churchwarden.

(*s*) Where the plaintiff alleged an indictment at the *quarter sessions*, and by the record it was at the general sessions, the word *quarter* was rejected as surplusage. *Busby v. Watson*, 2 Bl. 1050. But it was held, that it would have been otherwise, if the offence had been cognizable only at the quarter sessions, and not at the general sessions. See also *Constantine v. Barnes*, Cro. J. 33.

If the declaration set forth an indictment containing several charges, it is sufficient to prove that some of them were maliciously preferred, though there was ground for the rest (*t*).

[*447] It is not necessary, as in a declaration for slander *or libel, to state the very words or expressions used in making the charge; for the malicious prosecution, and not the words themselves, is the gist of the action. But it is necessary to state the substance of the charge. Where the prosecution is by indictment, the declaration should state the material parts of the indictment. Where the prosecution is by application to a magistrate, the substance of the charge should be stated according to the magistrate's warrant, or from the written examination of the defendant before the magistrate, where the contents of those documents can be ascertained. It is sufficient to describe the substance of the charge and advisable to state merely the substance, in order to avoid the danger of variance.

Where the declaration, professing to set out the substance of the charge, in specifying the goods and their value, used the word *valoris* for *valentie*, it was held that the variance was immaterial (*u*). But it was said, that it would have been otherwise, had the indictment been set out in *hæc verba* (*x*). So where the declaration alleged that the defendant charged the plaintiff before the magistrate with assaulting and *beating* him, and the charge was, in fact, for assaulting and *striking*, it was held that the description was [*448] *in substance correct (*y*). So, where the declaration for a malicious arrest stated the warrant to be to arrest the plaintiff for an assault, with intent to rob A. (the informant), and the words of the warrant were to rob, as he verily believes (*z*). Where the declaration alleged that the defendant charged the plaintiff with felony before a magistrate, it was held that the averment was supported by proof of a charge made, stating the suspicion of the defendant (*a*).

(*t*) *Reed v. Taylor*, 4 Taunt. 616.

(*u*) *Johnson and uxor v. Browning*, 6 Mod. 216.

(*x*) *Ib.*

(*y*) *Byne v. Moore*, 1 Taunt. 589.

(*z*) But note that a juror was afterwards withdrawn.

(*a*) *Davis v. Noak*, 1 Starkie's C. 377. Cor. Lord Ellenborough, C. J. and afterwards by the Court of King's Bench, Bayley, J. dissentiente.

A general allegation that the defendant, made a charge of felony, &c. (*crimen felonix imposuit*) is sufficient, or at least it is good after verdict (*b*). For such an allegation is not supported by proof of mere words without going before a magistrate and preferring *crimen* that is a charge of felony, without reference to the precise mode.

*In the case of *Blizard v. Kelly* (*c*), it was held, that [*449] a count alleging that the defendant had wrongfully, and without reasonable or probable cause, imposed the crime of felony on the plaintiff, was good after verdict. In the case of *Coleman v. Goodwin*, cited from the note book of Gibbs, L. C. J. the ninth count of the declaration, on which the plaintiff had obtained a general verdict, alleged that the defendant had imposed the crime of having been guilty of unnatural practices on the plaintiff, and the court refused to arrest the judgment, saying that it must be understood to mean an accusation before a magistrate, but that in such an accusation it was not necessary to make use of words of legal charge, that is made out afterwards by evidence.

But if the defendant, before the magistrate, stated facts, which shewed the plaintiff to have been guilty merely of a tortious conversion of the defendant's goods, on which, however, the magistrate erroneously issued a warrant for felony, the circumstances will not warrant an allegation that the defendant charged the plaintiff with a felony (*d*).

2dly. The determination of the prosecution *must be [*450] shown by proper averments (*e*). Where the plaintiff has been actually acquitted by the verdict of a jury, it ought to

(*b*) See *Davis v. Noak*, 1 Starkie's C. 377. And it was held, in that case, by three of the judges (Bayley, J. dissentiente), that such a charge is supported by evidence, that the defendant stated to the magistrate that he had been robbed of certain specified articles, and that he suspected and believed, and had good reason to suspect and believe, the plaintiff had stolen them.

(*c*) 2 B. & C. 283.

(*d*) *Leigh v. Webb*, 3 Esp. C. 167. 1 Starkie's C. 67.; and see *Cohen v. Morgan*, 6 D. & R. 8.

(*e*) Willes 250, n. a. 1 Doug. 215. 10 Mod. 209. Com. Rep. 190. 1 Esp. C. 79. Bac. Ab. Action. on Case, H. Com Dig. Action on Case, Conspiracy, C. 5. 2 T. R. 225—232. 1 Will. Saund. 228, 9. *Alverton v. Tregon*, *Yelv.* 116. *Lewis v. Yarrell*, Str. 114. *Parkes v. Langley*, Gil. R. 163.

be alleged that the plaintiff was, in due form of law, *acquitted* (*f*) according to the fact. And it would, it seems, be insufficient to allege merely that the plaintiff was released and discharged from the said imprisonment (*g*). And care should be taken to allege the acquittal according to the fact. If the declaration allege an acquittal in Bank, it will not be satisfied by proof of an acquittal at Nisi Prius (*h*). But if the day, on which the acquittal is alleged *to have taken place, be not averred by way of description of the record, a variance from the day of acquittal, as alleged, will not be material. Thus where the declaration averred that *afterwards*, to wit, on the morrow of the Holy Trinity, &c. the plaintiff was in due manner and by due course of law acquitted; and, by the record of Nisi Prius, it appeared that the acquittal took place on Tuesday next after the end of Easter Term, the proof was held to be sufficient (*i*). It would be otherwise, if the day were so alleged as to be descriptive of the word (*k*). But if the date be not alleged as descriptive of the word, a variance would not be fatal, though the acquittal were unnecessarily alleged with a *prout patet per recordum* (*l*).

An allegation that the plaintiff has been discharged by the grand

(*f*) The word acquitted must be taken in its legal sense, viz. by a jury, 2 T. R. 231. Where the declaration alleged that the plaintiff, by a jury of the county of—, was duly and in a lawful manner acquitted, and by the record it appeared that the jury found the plaintiff not guilty; and upon that verdict the judgment of the court was that the plaintiff should go thereof acquitted; it was holden to be sufficient for *reddendo singula singulis*, the plaintiff was duly acquitted by a jury, that is, found not guilty of the facts, and in a lawful manner acquitted by the judgment of the court. *Hunter v. French*, Willes 517.

(*g*) *Morgan v. Hughes*, 2 T. R. 225. (*h*) *Woodford v. Ashley*, 11 East. 508.

(*i*) *Purcell v. Macnamara*, 9 East, 157, over-ruling the case of *Pope v. Foster* 4 T. R. 590, and see *R. v. Hucks*, 2 Starkie's C. 521, and *R. v. Payne*. Cor. Lord Kenyon, West. Sittings after Mich. 29 G. 3. See Starkie on Evidence, pt. iv. p. 910.

(*k*) 9 East. 160. *Green v. Rennett*, 1 T. R. 656.

(*l*) *Stoddart v. Palmer*, 3 B. & C. 2. Co. Litt. 303. *Wate v. Briggs*, 1 Lord Ray. 35. 3 Salk. 565. See the case of *Phillips v. Shaw*, 4 B. & A. 435. 5 B. & A. 984. *Gadd v. Bennett*, 5 Price 549. *Rastall v. Stratton*, 1 H. B. 49.

jury's throwing out the bill, sufficiently shews that the prosecution has been legally determined (*m*).

*Where the plaintiff has been discharged, after ex- [*452]
amination before a magistrate, or after such examination,
the prosecutor has abandoned the charge, and where an absolute
acquittal cannot be alleged, it should be alleged that the plaintiff
was discharged out of custody, fully acquitted and discharged of the
said supposed offence, and that the complaint and prosecution have
been abandoned by the prosecutor, and were wholly ended and de-
termined (*n*).

It must be alleged that the defendant acted falsely and maliciously,
and without any reasonable or probable cause in preferring the
charge. But it seems that the word falsely, without maliciously,
would suffice (*o*).

3rdly. The *damage* resulting to the plaintiff. This may be either
to his person by imprisonment, to his reputation by scandal, or to
his property by expense (*p*); or it may consist in the personal
labour and trouble imposed on the plaintiff in procuring his acquittal
or discharge, and the pain and anxiety of mind naturally occasioned
by the pendency of a criminal charge.

(*m*) 2 T. R. 232.

(*n*) See Chitty on Pleading, vol. 2. p. 293, 3d edit. The omission to shew
the determination of the former prosecution will be aided by verdict. Com.
Dig. Action on the Case, Conspiracy C. 5. Bac. Ab. Action on Case II.

(*o*) 1 T. R. 544. 4 Burr. 1774. 1 Wils. 232. B. N. P. 14.

(*p*) See 1 T. R. 493. Gilb. Cas. L. & E. 185, 202. 12 Mod. 208. Chitty
on Pleading, vol. 2. 290, 3d edit.

CHAPTER XVI.

OF THE DEFENDANT'S PLEA.

*THE principal circumstances of which the defendant
[*453] may avail himself in resisting an action for slander have already been adverted to (a), the technical mode of answering the charge on the record is next to be noticed.

Under this division it is to be considered—1st. In what cases the defendant may give his defence in evidence under the general issue, and in what instances he is confined to the plea of the general issue.

2dly. In what cases the defence may be pleaded specially, and in what cases it must be so pleaded.

3dly. How it should be specially pleaded.

1st. The defence may consist either in a mere denial of the fact of publishing the injurious matter as alleged, or of the damage alleged to have resulted from it, when such consequential damage is the gist of the action, or of matter of justification
[*454] *or excuse, arising from collateral circumstances, or in some matter which has discharged a previously existing right of action. The plea of the general issue, 'not guilty,' obliges the plaintiff to prove all the facts, as alleged in his declaration, which are essential in law to his right to recover; consequently the plea of the general issue is proper and sufficient in all cases where the defendant means to deny or disprove any fact essential to the

(a) Supra Ch. 9 to 14 inclusive.

plaintiff's case. As where he means to deny that he spoke the words, or published the libel set forth in the declaration, or that the terms of the alleged slander were used in the calumnious and actionable sense attributed to them by the plaintiff, or that the injurious consequence alleged by the plaintiff resulted from the act of speaking or publishing, complained of.

And he may also, in all cases where the occasion and circumstances of the speaking or other publication are such as to call on the plaintiff to prove express or actual malice, establish such occasion and circumstances by evidence under the general issue, and the proof will serve as a defence, unless it appear that he acted not honestly according to the occasion, but out of actual malice and ill-will.

For in such cases, that is where the occasion and circumstances of the speaking the words, or *publishing the [*455] libel, throw it on the plaintiff to prove a dishonest and malicious intention in fact, such proof becomes an essential part of plaintiff's case; and, therefore, the evidence offered to rebut it is properly admissible, under the plea of the general issue [1].

[1] The defendant may accordingly, under the general issue, shew that the alleged slander consisted in a communication to the appointing power of the state, in reference to the conduct of the plaintiff as *public officer*, or to officers, judicatories or individuals authorized by law to redress grievances, *Thorn v. Blanchard*, 5 Johns. R. 508; *Howard v. Thompson*, 21 Wendell 319; *Vanderzee v. McGregor*, 12 Wendell 545; *O'Donaghue v. McGovern*, 23 Wendell 26; 1 Tyler's R. 164; 2 Id. 129; 2 Serg. & Rawle 23; 4 Id. 420; 3 Pick. 379; *Woodward v. Lander*, 6 Carr. & Payne 548; *Blake v. Pifford*, 1 Moody & Robinson 198; and it seems he may do so, even though the application be made to parties who have no direct means of giving relief. *Fairman v. Ives*, 5 Barn. & Ald. 647. Or in communications on matters of business made by or to persons *interested in the subject matter of the communications*, although they affect the *character or credit* of the plaintiff, *Spike v. Cleyson*, Cro. Eliz. 541; *Prosser v. Bromage*, 4 B. & C. 247; *Delany v. Jones*, 4 Esp. C. 191; *McDougall v. Claridge*, 1 Camp. C. 267; *Dunman v. Bigg*, 3 Camp. C. 260; *Brown v. Croome*, 2 Starkie's C. 297; *Todd v. Hawkins*, 8 Carr. & Payne 88; *Knight v. Gibbs*, 3 Neville & Manning, 467; *Shipley v. Todhunter*, 7 Carr. & Payne 680; *Cockayne v. Hodgkinson*, 5 Carr. & Payne 543; *Godson v. Flower*, 2 B. & B. 7; *Bradley v. Heath*, 12 Pick. 163, or in giving the character of a ser-

So again, if the immediate occasion and circumstances of the publication be such as to exclude the plaintiff's action altogether, without regard to the question of motive or intention, the general issue is a sufficient plea; for then the defendant has not acted wrongfully or maliciously in a legal sense; in other words, the occasion rebuts the inference of legal malice (*b*), which is essential to the action.

[*456] *And, therefore, the defendant may shew that when he did the act complained of, he was acting as a judge or juror, or as a party or witness in a judicial proceeding [1].

vant, Weatherstone v. Hawkins, 1 T. R. 110; *Rogers v. Clifton*, 3 Bos. & Pul. 587; *Edmonson v. Stevenson*, Bull. N. P. 8, and *Hodgson v. Scarlett*, 1 Barn. & Ald. 240, per Lord Ellenborough.

(*b*) It is again to be observed, that legal malice is the same in effect with the absence of legal excuse, where the act itself is wilful, and is unlawful. And, therefore, it would be more proper to say, that by law the particular occasion is a bar to the action, than to say that the particular occasion rebuts the inference of malice. Malice, in the legal sense, being but negatively essential to the right of action; it is but superfluous and circuitous to say, that the absence of a legal excuse is rebutted by the existence of a legal excuse, and so the action is barred. It is probable that at an early period, and before the law itself had, by the aid of increased experience, declared and defined the circumstances which should afford a legal defence, but when, nevertheless, it still was necessary to lay down some limit, in order that mutual communications might not be too much fettered, the existence or absence of *actual malice* was constituted the legal limit to the action. It would, in process of time, be discovered that such a limit was inconvenient in itself, and not sufficiently supported by principle to constitute the general boundary between legal and illegal communications; that it was better that the law should, *in reference to the occasion*, distinguish between privileged and illegal communications, and that, on the one hand, some occasions ought to constitute an absolute defence, without reference to motive; that, on the other, where the law afforded no protection, the mere absence of an actual and deliberate intention to injure ought not to be a defence to an action for wilful defamation. Malice, however, was still retained as a descriptive term, though it had necessarily acquired a new and technical sense.

[1] The defendant may shew that the act complained of was done by him as a judge, a juror, a witness or party in the course of a judicial proceeding, whether civil or criminal. 2 Inst. 228; 2 Roll. R. 198; Palm. 144; 1 Viner's Ab. 387; Cro. Eliz. 230; *Lake v. King*, 1 Saund. 131; or as a member of a military court martial or court of inquiry, *Jekyl v. Sir John Moore*, 2 N. R. 241; *Home v. Bentinck*, 8 Price 226.

Under this plea the defendant may also shew that the publication complained of was procured by the contrivance of the plaintiff, with

So the defendant may, under the general issue, show that the publication was a *petition to the Legislature* for redress of grievances. See *Hare v. Mellen*, 3 Lev. 169; 4 Co. 14, and the resolution of the House of Commons in England in *Kemp v. Gee*, 9 Feb'y, 8 Will. iii., supra p. 245; that the words alleged to be libellous were spoken by him as a *member of the Legislature* on the floor of the House. 1 Black. Comm. 164; *King v. Lord Abingdon*, 1 Esp. R. 226; *Rex v. Creevy*, 1 Maule & Sel. 273; *Hastings v. Lusk*, 22 Wendell 417, per Chancellor Walworth; 4 Mass. R. 1; 3 Pick. 314; or upon an application in the usual course to a magistrate or peace officer for process, *Ram v. Lamley*, Hutt. 133. See also *Barbaud v. Hookham*, 5 Esp. C. 109; *Johnson v. Evans*, 3 Esp. C. 32; *Burton v. Worley*, 4 Bibb. 38; and *Shock v. McChesney*, 4 Yeates 507. Or that the publication took place in the usual course of a civil or criminal proceeding in courts of justice. 1 Roll. 33; 4 Coke 14; 2 Burr. 817; Cro. J. 432; 3 Black. Comm. 126. 10 Mod. 210, 219, 300. Str. 691. Dyer 285.

So, the defendant may, under the general issue, show that the words were spoken by him as an *advocate or counsel* on the trial of a cause, and that they were relevant to the matter in issue. Such seems the unavoidable conclusion to be drawn from the cases of *Brooke v. Sir Henry Montague*, Cro. Jac. 90, and *Hodgson v. Scarlett*, 1 Barn. & Ald. 232, notwithstanding the doubts suggested by the learned editor. Supra page 254, note (n), and infra page 460, note (m).

Whether, under the plea of the *general issue* the defendant may show that the publication is a *true and faithful account of a judicial proceeding*, or *must* plead the facts specially to enable him to give the proof, is, perhaps, questionable. Learned judges have doubted upon the question. *Curry v. Walton*, 1 Bos. & Pul. 525; and the able author of this most valuable treatise had serious difficulty in making up his mind in reference to it. The most prudent course, therefore, as the question still remains undecided, probably is, to plead it specially; and if it be advisable to do so where the publication relates to a *judicial proceeding*, it clearly is so when it relates to a *parliamentary proceeding*; the latter, it seems, not being regarded with the same favor as the former. See supra p. 261 and note (f).

In reference to the question whether, in the case of *privileged communications*, it is necessary to plead the defence *specially*, it may be well to add what was said by LORD DENMAN, C. J., in the case of *Lillie v. Prin.* The defendant, an attorney, was prosecuted in an action for a *libel* for writing a letter to a former client, warning him not to have any thing to do with the plaintiff. The question submitted to the court was, whether under the new rules of pleading adopted in England in Hilary Term, 4 Wm. IV., the defence of privileged communication should be specially pleaded. LORD DENMAN said, "We are all of opinion that this defence does not require to be pleaded specially. It goes to the

a view to an action, for in such case he was the voluntary author of the mischief (*c*),

He may also shew, under this plea, that the action has been discharged by matter subsequent as by accord and satisfaction (*d*), or by a release.

[*457] *Next, in what cases is the defendant confined to the plea of the general issue. Where the defendant seeks simply to deny the fact of publishing the alleged slander or its application, or consequences, according to the ordinary and elementary rule of pleading, he must confine his plea to the general issue, and cannot plead the matter specially, for though it were specially pleaded, it would still amount but to the general issue.

So it seems that in all cases where the circumstances and occasion of the speaking the words, or publishing the libel, do not furnish an absolute bar to the action, without regard to the defendant's motives and intention, but merely throw it on the plaintiff to prove malice in fact, the defendant cannot plead such occasion and circumstances specially, but must plead the general issue; for such facts do not supply an absolute bar to the action, but merely a continual one, the condition being the absence of express or actual malice, which is always a question for the jury. Such facts, therefore, cannot be pleaded specially, for if they were, the effect would be to take away that question of fact from the consideration of the jury, upon which

very root of the action. It shows the party not guilty of malice, and consequently it is open to him without having pleaded it." 5 Adolph. & Ellis 645; 1 Neville & Perry 16; and 2 Harr. & Woll. R. 645, s. c. See also what is said by Chancellor WALWORTH on this question in *Hastings v. Lusk*, 22 Wendell 416.

(*c*) *King v. Waring and ux.* 5 Esp. C. 13. See also *Smith v. Wood*, 3 Camp. 323. Where the defendant having shewed to the witness, at the request of the latter, a caricature of the plaintiff, it was held that this was not sufficient to support the action. See also *Weatherstone v. Hawkins*, 1 T. R. 110 [1].

(*d*) *Lane v. Applegate*, 1 Starkie's C. 97. The plaintiff agreed to waive his right of action, if the defendant would destroy certain documents, which the defendant accordingly did, and it was held that this evidence was admissible in bar of the action under the general issue.

[1] See note [1] p. 208 *supra*.

the whole case *depended (*e*) the decision of which lay [*458] within their own peculiar province.

Such a plea would be bad in point of law, in reference to the ordinary and elementary principles of pleading; for every plea ought to disclose such facts as, if they be true and stand uncontradicted and unqualified, supply an answer to the action. But in the class of cases alluded to, all the facts might be true, and yet by reason of the existence of express malice they would afford no answer to the action.

It seems, therefore, to be clear in principle, that whenever the occasion and circumstances of the speaking or publishing do not furnish an absolute bar to the action, but merely throw it on the plaintiff to prove malice in fact, the defence cannot be specially pleaded, but must be given in evidence under the general issue (*f*).

If the repetition of slander, from the report of *another, affords not an absolute and peremptory bar to the action, but merely a qualified one, dependent on the absence of ex- [*459] press malice, it seems to be very doubtful whether such a defence can be specially pleaded (*g*). [1].

Where the action is brought for claiming title to an estate, by means of which the plaintiff is prevented from selling or letting it, and the declaration alleges that the defendant asserted a false title, *knowing it to be false*, if the defendant has in fact any colour of claim, he should plead the general issue; by which means the plaintiff will be obliged to prove, under the general issue, that the defendant knew it to be false (*h*); and the fact of knowledge cannot, it seems, be traversed in pleading (*i*).

(*e*) Abbott, L. C. J. in the case of *Lewis v. Walter*, 4 B. & A. 605, intimates, that special matter of defence could not be pleaded in bar, unless it supplied an answer to the charge of malice. If the plea were, in addition to the disclosure of such facts as rendered proof of actual malice essential, also to negative the existence of malice, it would be demurrable; for, contrary to the first rules of pleading, it would both deny that which the plaintiff would be bound to prove under the general issue, and it would confess and avoid.

(*f*) See *Lewis v. Walter*, 4 B. & A. 605.

(*g*) See *Lewis v. Walter*, 4 B. & A. 605, *supra* 337.

(*h*) 2 East. 237.

(*i*) 4 Co. 18. Cro. J. 398. Probably so held because there could be no proper venue.

[1] See note [1] p. 340, *supra*.

As the action for a malicious prosecution, is an action on the case in which the plaintiff is bound to allege all the circumstances of the prosecution, and that it was instituted maliciously and without probable cause, the proper plea in bar is the general issue.

2dly. On the other hand, it seems to be clear, that in all cases where the occasion or circumstances attending the speaking or publishing, *furnish an *absolute* bar to the action, [*460] the defence *may* be specially pleaded; for, in all such cases, the plea admits the facts alleged by the plaintiff, but shews, by the allegation of other additional facts, that, upon the whole of the case, the plaintiff is not entitled to recover: in other words, the defendant by his plea *confesses* and *avoids* the statement made by the plaintiff; and, therefore, he may plead (*j*) specially that the imputation was true, that the words were spoken, or the alleged libel published by the defendant, as a member of either house of parliament, in the course of his parliamentary duty (*k*). By a judge acting in his judicial capacity (*l*). By an advocate in the management of a cause where they are pertinent to the issue, and have been suggested by the client (*m*). By a party to a parliamentary or judicial proceeding, according to the ordinary course of such proceedings (*n*).

So, the defendant may not only by means of a special [*461] plea justify his act, but he may also show by *extrinsic matter, that the words or alleged libel are not in their own nature actionable.

For although such a defence involves a denial of that which the plaintiff, under the plea of the general issue, would be bound to prove, that is, that the words or libel were really used and applied in the injurious sense and manner alleged by the plaintiff; yet, it admits the speaking or publishing the words or libel stated, and supplies facts, which, if true, show that the matter published is not in

(*j*) Such a defence, as will be seen *must* be pleaded specially; see below [1].

(*k*) 1 Esp. C. 226. 1 W. & M. st. 2. c. 2. R. v. Creevy, 1 M. & S. 273.

(*l*) 2 N. R. 141.

(*m*) Cro. J. 90. Poph. 69. See *Scarlett v. Hodgson*, 1 B. & A. 232.

(*n*) *Lake v. King*, 1 Saund. 132. 3 Lev. 169.

[1] See note [1] p. 456, *supra*.

its own nature actionable ; and, consequently, renders the allegations of the plaintiff, as to the motives of the defendant, and the application of the matter published, wholly immaterial (*o*).

The general rule, as laid down in *Cromwell's* case (*p*), is, that the defendant shall never be put to the general issue when he confesses the words and justifies them, or confesses the words, and by special matter shows that they are not actionable.

And therefore it has been held that, in an action for calling the plaintiff a murderer, it may be pleaded that the word was used in the course of a conversation about unlawful hunting, and that the words merely imported that the plaintiff was *a [*462] murderer of hares (*q*). So, where the plaintiff declared upon an imputation of an unlawful maintenance, it was held that the defendant might justify, by showing that the words were used in reference to a lawful maintenance (*r*).

So, in the case of *Kinnersley v. Cooper* (*s*). The plaintiff declared that he had taken an oath, which was recorded in the court of the Guildhall, in a judicial proceeding ; and that the defendant speaking of that oath, had said, that he had sworn falsely. The defendant, in his plea, denied that any such oath had been taken ; and the plaintiff demurred, on the ground that the taking the oath was but conveyance to the action, and not traversable ; and secondly, that the plea was bad, since it amounted to the general issue. But the justices were of opinion that the matter was traversable, since the action was grounded upon it.

In the case of *Lord Cromwell v. Denny* (*t*), the plaintiff declared in scandalum magnatum against the defendant, for having charged him with liking those who maintained sedition.

The defendant pleaded that he was vicar of Northlinham, which was a benefice with the *cure of souls ; and [*463] that the plaintiff procured J. T. and J. G. to preach severally in the church of Northlinham ; who, in their sermons, inveighed against the Book of Common Prayer, which was established by the Queen and the whole parliament in the first year of her reign,

(*o*) If the fact be justified, the motives, intention and manner are immaterial.
 Burr. 807. (*p*) 4 Rep. 14. Pooh. 66. (*q*) 4 Rep. 14.
 (*r*) Cro. Jac. 90. (*s*) Cro. E. 168. 4 Rep. 14. (*t*) 4 Rep. 14

and affirmed it to be superstitious and impious ; upon which the plaintiff and defendant, speaking in the said church of these sermons, because the vicar knew that they had no licence, nor were authorized to preach, when they were ready to preach, before their sermons, forbade them, but they, by the encouragement of the plaintiff, proceeded, when the plaintiff said to the defendant, "Thou art a false varlet, I like thee not." To which the vicar said, "It is no marvel that you like not of me, for you like of these (innuendo the said J. T. and J. G.) that maintain sedition against the Queen's proceeding." It was moved, by the plaintiff's counsel, that the plea was bad, since, if the matter contained in it amounted to a justification, then upon a dialogue between the parties, the defendant was not guilty, and that he ought to have pleaded so, and given the matter in evidence. But the court held, that the defendant had done well to show the special matter by which the sense of the word sedition appears, upon the coherence of all the words, not

[*464] *to mean any violent and public sedition, as it had been described to mean, and as *ex vi termini* the word itself imports (*u*).

It seems, also, that the defendant may either plead, or show by evidence on the general issue, that the right of action which once existed has been discharged as by a subsequent release.

It seems also that, in general, any matter which in law discharges a right of action, for any slander or libel, may be either given in evidence under the general issue, or may be specially pleaded.

Thus the defendant may give accord and satisfaction in evidence under the general issue (*x*).

(*u*) See also Brittridge's case, 4 Co. 18. The words set out in the declaration were, *Mr. Brittridge is a perjured old knave*, and that is to be proved by a stake parting the lands of H. Martin and Mr. Wright ; after a verdict for the plaintiff, the defendant succeeded in arresting the judgment ; for though it was held by the court, that the words in italics were actionable, they were of opinion, that their force was explained away by the latter, which showed that no judicial perjury was intended, so that, had the latter words been omitted the plaintiff might have retained his verdict ; but had the plaintiff omitted the latter words, the defendant might have shown the context by his plea, and so have defeated the action.

(*x*) *Lane v. Applegate*, 1 Starkie's C. 97. But the statute of limitations must, as will be seen, be pleaded.

So the defendant may, by his plea, disclose special matter which shows that the plaintiff has *sustained no [*465] damage from the words, provided the special damage be the gist of the action.

Where the plaintiff alleged that by reason of the speaking of the words he had lost his marriage with J. S. the defendant pleaded that J. S. was the aunt of the plaintiff (*y*): but, in such a case, the plea of *non damnificatus* would be bad (*z*).

In the next place there are some grounds of defence which *must* be pleaded specially, and which cannot be disclosed in evidence under the general issue, even although they afford a conclusive bar to the action.

In the first place, where the defendant means to insist that the imputation is true, he must as well, it seems, upon general principles of law, as on considerations of policy and convenience, plead such defence specially [*a a*].

On legal principles he must do so, for the fact which supplies the justification is collateral to the cause of action, and the proof of it does not contradict or repel any matter which the plaintiff would be bound to prove (*a*).

*On grounds of convenience and policy, it is obviously [*466] necessary, that a party charged with the commission of

(*y*) Dyer 26. It has been said, that the defence would not be admissible under the plea of the general issue. B. N. P. 7. tamen qu. (z) Ib.

[*a a*] So the defendant is not at liberty to give evidence in mitigation of damages of any fact which would be evidence to prove a justification of any part of the libel, for he ought to justify as to that part. Vessey v. Pike, 3 Carr. & Payne 512.

(*a*) See Smith v. Richardson, Willes 20. It seems, however, to be very questionable, whether the rule does not rest better upon the foundation of policy and convenience, than on the strict rule of pleading; in other words, it is doubtful whether the *falsity* of the charge is not, in principle, essential to the right of action. This is, however, a subject of mere speculation; for undoubtedly, the rule is perfectly well settled on the grounds of public policy, that such a justification must be pleaded; and even independently of that rule, the proof of the truth of the charge would lie on the defendant, for the law would presume the plaintiff's innocence till the contrary appeared. Vide supra, p. 229, and p. 5. in the note.

an illegal or immoral act, should be apprized, by means of a special plea, of the nature and circumstances of the charge, in order that he may be prepared to meet it, and, if it be unfounded, to refute it.

The rule of law upon this head has long been settled, that the defendant, if he mean to rely upon the truth of that which he has published, either in bar of the action or in mitigation of damages, must plead it specially [1].

Formerly a distinction was made in this respect between words imputing an offence generally, and such as charged a particular and specific one.

In the case of *Smith v. Richardson* (b), the twelve judges were unanimously of opinion, that where the words import a
[*467] general felony, as “Thou art a thief,” or “Thou stolest a horse,” or any other thing not specifying the person from whom or when and where it was stolen, the defendant ought not, upon the general issue, to be allowed to give the fact in evidence to mitigate damages. The words in the principal case were, “John Smith is a rogue, and hath stolen my beer; John Smith has robbed me of my beer;” and eight of the judges were of opinion, that in no case whatever where the words imported felony or treason, such evidence ought to be admitted on not guilty pleaded; but four were of opinion that it might, where the words imported a particular felony.

But in the case of the *Bishop of Salisbury v. Nash*, cited in the above case, which was an action for saying of the plaintiff, “He preacheth nothing but lies in the pulpit,” the defendant pleaded not guilty, and his counsel offered to give evidence of the truth of the words in mitigation of damages; but Lord Macclesfield refused to admit it with great indignation.

Where a particular offence, not capital, was charged(c), evidence of the truth was allowed, under the general issue.

[1] This doctrine is fully recognized in *Andrews v. Van Duzer*, 11 Johns. R. 38; *Shepard v. Merrill*, 13 Id. 475; *Van Ankin v. Westfall*, 14 Id. 233; *Else v. Ferris*, Anthon's N. P. 23; and *Barns v. Webb*, 1 Tyler 17. As to giving the truth in evidence in mitigation of damages, see page 233 *supra*, note [1].

(b) Willes 20

(c) B. N. P. 7.

But in the case of *Underwood v. Parkes*, the defendant pleaded not guilty (*d*), and offered *to prove the words to be true in mitigation of damages, which the chief justice refused to permit, saying, that at a meeting of all the judges upon a case that arose in the Common Pleas, a large majority of them had determined not to allow it for the future, but that it should be pleaded, whereby the plaintiff might be prepared to defend himself, as well as to prove the speaking of the words. That this was now a general rule amongst them all, which no judge would think himself at liberty to depart from; and that it extended to all sorts of words, and not barely to such as imported a charge of felony. [*468]

Where the justification is that the defendant has published no more than a true and faithful account of a *judicial proceeding*, considerable doubt has been entertained upon the question, whether the defence must be pleaded specially, or whether it be available under the general issue; and the point, though it be exceedingly important, has not yet been finally decided [1].

An action was brought against the editor of the Times newspaper (*e*), for a libel on the plaintiff; the publication complained of, purported to be an account of an application to the Court of King's Bench, for an information against the plaintiff and Mr. Bingham, both justices of the *peace for Hampshire, for refusing to license an inn at Gosport. The defendant pleaded the general issue; and at the trial, after the plaintiff had proved the publication of the paper by him, a person whom he employed to collect legal intelligence for the use of his paper, was called, in order to prove that the report was a true and faithful account of what had passed in the Court of King's Bench upon the motion. It was objected on the other side, that the defence ought to have been put upon the record, and could not be given in evidence under the general issue. The objection, however, was overruled by Eyre, C. J. and the jury found a verdict for the defendant. Afterwards a motion was made in arrest of judgment; one ground for which was, that the matter prov- [*469]

(*d*) Str. 1200.

(*e*) *Curry v. Walter*, 1 B. & P. 525.

[1] See note [1] page 456 *supra*.

ed by the defendant, at the trial, had been improperly received in evidence under the general issue, and ought to have been pleaded in bar to the action. After argument, the court doubted upon this point, the case stood over, and no judgment was ever given.

Without presuming to venture an opinion on so important a point which remains still undecided, it may be observed, that the question seems to resolve itself mainly into the consideration, whether the courts will deem it proper, on principles of convenience, to adhere to the ancient rule of law, according to which it seems [*470] *that such a collateral ground of defence ought to be specially pleaded, or will relax the rule in the present case as has been done in many others.

In the first place, the defence is founded upon considerations of external policy, for, when it has been established, it does not destroy or contradict any matter which is essential to the cause of action, or which the plaintiff would be bound to prove under the general issue. Such a defence admits a publication of noxious matter, and the malice of the publisher, however inveterate, is wholly immaterial.

According, therefore, to the general and elementary principles of pleading, a justification of this nature, which confesses the facts alleged by the plaintiff, and avoids them by additional matter, ought to be pleaded specially (*f*).

Such a defence differs most essentially from all, where the occasion of speaking or publishing enures, *prima facie*, as a protection to the defendant, and throws it on the plaintiff to prove actual malice, for then, as has already been observed, the defence not only *may*, but *must* be offered in evidence under the general issue, and cannot be pleaded specially, because there the occasion does not supply an absolute bar to the action; the defence in question, on the [*471] other *hand, operates as a peremptory bar to the action, and, at all events, *may* be pleaded specially.

On the contrary, such a defence resembles a justification founded on the truth of the publication, for though the defendant does not allege that the fact imputed was true, yet he insists that his state-

ment was true, namely, that the imputation was, in fact, part of a judicial proceeding, which he has faithfully reported. In the one case, as well as the other, the defence is founded on considerations of extrinsic policy.

It does not indeed by any means necessarily follow, that, because such a defence *may* be pleaded specially, it *must*, therefore be pleaded specially; inasmuch as the general rule of pleading has been much relaxed, and many exceptions have been, from time to time, introduced. Still the question is, whether the case be an exception, or not, to the general rule, or whether, on grounds of policy and convenience, it ought to be an exception, and the onus of proving the affirmative clearly lies on those who assert it.

In the case of *Curry v. Walter (g)*, though the evidence was admitted at Nisi Prius, under the general issue, yet the court were afterwards equally divided upon the subject, and no judgment was ever given. This case therefore supplies *no authority whatever for relaxing the general rule of pleading in [*472] such cases.

The practice, on the contrary, has been, with a few exceptions, to plead such a defence specially (*h*) [1].

Considerations of policy and convenience concur with the ordinary practice. It frequently happens, where such a defence is set up, that the whole question turns upon legal points, which are decided with greater convenience, with more expedition, and with less expense to the parties, when raised upon the face of the record by the pleadings, than where the defence is reserved for the trial, and then for the first time disclosed; and it would frequently be highly inconvenient that it should be left to the court and jury, at Nisi Prius, to apply the report to the alleged libel, and to distinguish between what was justifiable and what was not so (*i*).

(*g*) 1 B. & P. 525.

(*h*) See *Astley v. Yonge*, Burr. 807, which was previous to *Curry v. Walter*, and see *Stiles v. Nokes*, 7 East. 493.

[1] See also *Lewis v. Clement*, 3 Barn. & Ald. 702, tried in 1818, in which a special plea was interposed; and *Flint v. Pike*, 4 Barn. & Cres. 473.

(*i*) See 7 East. 493, where it was held, that where part of a publication consists of a report of judicial proceedings, and the rest of comment, since a separation

*Where the defence is, that the defendant merely repeated that which he heard from another, and that he divulged his [*473] authority at the time of repetition, the ordinary course has been to plead the justification specially (*k*). And it has been held that, without such a plea, the fact is not available, even in mitigation of damages (*l*); and, therefore, it would not be safe to trust such a defence to the general issue [1]. It seems however to be doubtful, whether such a plea, unless it disclosed circumstances which rendered the question of actual malice immaterial, would be good in law, as the effect would be to withdraw the question of actual malice from the consideration of the jury (*m*).

By the stat. 21 J. 1, c. 16, s. 3, it is enacted, that all actions on the case (other than for slander) shall be commenced and sued within six years next after the cause of such action or suit, and not after. And the said action on the case for words within two years after the words spoken, and not after. It has been held, under this statute, that the latter limitation applies to words in themselves actionable only, and not to cases where the special damage [*474] (*n*) is the gist of the action, nor to written slander, and it has been decided that cases of scandalum magnatum are not within the latter, though they are within the former, limitation (*o*).

It seems to be now fully settled, that if the defendant mean to avail himself of this statute (*p*), he must in all cases plead it.

Where the words are actionable, the time begins to reckon from the speaking of the words, but where the special damage is the gist of the action, it seems that it would not be sufficient for the defendant to aver, in his plea, that he did not speak the words within is necessary, for the purpose of defence, the defendant ought to take upon himself the burden of making it, in order that the court may see what parts he means to justify. And the defendant not having done so, the court held that the plea was bad, and would not permit the defendant to amend.

(*k*) *Woolnoth v. Meadows*, 5 East. 463.

(*l*) *Mills v. Spencer*, Holt's C. 533.

(*m*) See 4 B. & A. 605. *supra* 457.

(*n*) 6 Bac. Ab. 241. Cro. Car. 193. Salk. 206. 1 Sid. 95.

(*o*) Cro. Car. 535.

(*p*) 2 Will. Saund. 63. a.

[1] See note [1], p. 340. *supra*.

six years, because, though that was the fact, the special damage, which is the cause of action, may have arisen within the six years; he ought, therefore, to plead that the cause of action did not accrue within the limit.

But where special damage is consequent upon actionable words, it is (as is said) sufficient to plead that the defendant did not speak the words within the limited time.

4thly. How special matter must be pleaded.

Observations upon the manner of pleading relate to the plea of justification generally, to particular pleas, or to the joinder of different pleas.

*1. To the plea of justification generally. [*475]

The plea of justification in general must confess the publication as laid down in the declaration, otherwise it will be bad on demurrer (*q*); and this is an immediate consequence resulting from the great rule of pleading, which requires the party pleading either to confess the previous matter, and avoid it, or to traverse it.

In *Johns v. Gittens* (*r*), the words laid in the declaration were, "Thou has played the thief with me, and hast stolen my cloth and half a yard of velvet." The defendant pleaded that the plaintiff was his tailor, and that upon such a day he delivered to him a yard and a half of velvet, to make him a pair of hose, and he made them too straight; by reason whereof he spoke these words, "Thou hast stolen part of the velvet which I delivered you," denying that he spoke any words *aliter vel alio modo*.

The plaintiff demurred, and it was held that the plea was bad, for not confessing the words laid in the declaration (*s*).

*If the defendant justify specially, it will not be necessary for him in his plea to deny the innuendos and epithets contained in the declaration; for if the fact be justifi-

(*q*) Jon. 307. Cro. Eliz. 153. A plea of justification will sometimes cure a defective declaration. The words were "He is forsworn," and there was no averment to connect them with a judicial oath; but the plea averring that the words were spoken in reference to a judicial oath, it was held that the defect was cured. Cro. Car. 288.

(*r*) Cro. Eliz. 239.

(*s*) See also Cro. Eliz. 153, *Bellingham v. Mynors*.

ed (*t*), the motive, intention, and manner are immaterial. Unless, from the particular occasion of speaking the words, the day or the place become material, the plea should adopt the day and the place stated in the declaration without a traverse; but when they become material, and differ from those stated in the declaration, the plea should traverse the speaking of the words on the day or at the place laid in the declaration. Thus, if the plaintiff declare of words spoken at B., in the county of Salop, and the defendant mean to justify the publishing them in a judicial proceeding at Westminster, he should traverse (*u*) the publishing them at B., in Salop, at any time.

2. The special plea of justification, grounded upon the *truth* of the publication, may be considered, *first*, with reference to the matter contained in the plea; and, *secondly*, with regard to the charge complained of in the declaration.

The same degree of certainty and precision are required in this plea as are requisite in an indictment or information.

[*477] *In *Wylde v. Cookman* (*x*), the words were, "Thou wast forsworn in such a leet, on such a day." The defendant pleaded that the plaintiff the same day was sworn with others before the steward, to present, &c. and that they presented such a ditch not scoured *ad nocumentum*, &c. which was false, and so justifies, but did not say that they knew it to be false of their *own proper knowledge*. It was moved, on demurrer, that they might have presented it upon evidence. Gawdy and Fenner, Justices, held, that it was properly and commonly to be intended that the presentment was false of their own knowledge, and so perjury; and that if they presented it upon evidence, the plaintiff ought to shew it in his replication. But Popham, J. said, that a man may not justify by intendment, but that it ought to have been precisely alleged. But there was another defect in the plea, which was held by all

(*t*) Burr. 807.

(*u*) See the case of *Buckley v. Wood*, 4 Rep. 14. 1 Salk. 222. 1 Will. Saund 82. n. 3.

(*x*) Cro. Eliz. 492, as to the degree of certainty and particularity which is requisite in a plea. See the cases cited below 478. &c.

the justices to be incurable, namely, the want of an allegation that the ditch was within the leet; for if not, then the presentment thereof was out of their charge, and there was no perjury.

Secondly, as to the nature of the plea, with reference to the words laid in the declaration.

*Where the original charge is in itself specific, the [*478] defendant need not further particularize it in his plea.

In an action on the case (*y*) for calling the plaintiff thief, and saying that he stole two sheep of J. S., the defendant pleaded that the plaintiff stole the same sheep, by reason of which he called him thief, as well he might; and the plea was held to be good (*z*).

Though the charge imputed to the plaintiff be general, as laid in the declaration, the defendant must, in his plea, charge him with specific (*a*) instances of offences of the same nature with the general charge. Thus a defendant is not at liberty to charge a person with swindling, without shewing specific instances of it; for whenever one charges another with fraud, he must know the particular instances upon which his accusation is founded, and therefore ought to disclose them (*b*).

In *Morrice v. Langdale* (*c*), which was an action for calling the plaintiff (who was a stock jobber) a lame duck, the defendant justified, pleading generally that the plaintiff had not *fulfilled his contracts. Upon demurrer, Lord Eldon, C. [*479] J. observed, that it had been strongly argued in support of the demurrer to the plea, that in consequence of its generality the plaintiff must proceed to trial at the hazard of being able to produce evidence applicable to any contract which he ever made. But the declaration itself was defective, and the plaintiff had leave to amend.

In the case of *Newman v. Bailey*, the plaintiff, a justice of the peace, brought an action against the defendant, for having charged him with "pocketing all the fines and penalties forfeited by delin-

(*y*) Br. action sur cas. 27 H. 8. 22. pl. 3.

(*z*) 1 Roll. Ab. 87.

(*a*) Styles 118. Strachey's case. See the illustrations cited below, and Lane v. Howman, 1 Price 76.

(*b*) Johnson v. Stuart, 1 T. R. 748.

(*c*) 2 B. & P. 284.

quents whom he had convicted, without distributing them to the poor, or in any manner accounting for a sum of £50 then in hand." The defendant pleaded that the plaintiff was a justice of the peace, and that during the time he acted as such, he convicted divers and sundry persons respectively, in divers and sundry fines and sums of money, for and on pretence of their having respectively committed divers respective offences against the form of divers statutes of this realm; which said respective fines and sums of money, amounting in the whole to £50, he received of the respective delinquents so by him convicted, and had not paid the same to the several persons to whom the same ought to have been paid by virtue of the [*480] respective statutes, *but had kept and detained the same, &c. To this there was a special demurrer, and the court were clearly of opinion that the plea was bad, because it did not specify any one fine or penalty which had been unjustly levied (*d*).

The matter alleged in the justification to be true, must, in every respect, correspond with the imputation complained of in the declaration. Thus, where the defendant, in the first instance, charges the plaintiff with having feloniously stolen one kind of chattel, he cannot afterwards justify by pleading that the plaintiff had really been guilty of stealing a different one (*e*). And so with regard to every circumstance at all material, the facts set up by way of justification in the plea must be strictly conformable with the imputation charged in the declaration. The words for which the action was brought, charged the plaintiff with having been a bankrupt on the first day of April, in the 12th year of James the first. The defend- [*481] ant pleaded that the plaintiff *was a bankrupt on the first day of April, in the 15th year of the same reign,

(*d*) Hil. 16 G. 3. 2 Chitty's C. T. M. 665. So, where a libel charged an attorney with general misconduct, viz. gross negligence, falsehood, prevarication, and making out expensive bills of costs, in respect of business done for the defendant, a plea of justification merely repeating the same general charges, without specifying any particular acts of misconduct, was held on demurrer to be insufficient. *Holmes v. Catesby*, 1 Taunt. 543 [1].

(*e*) *Hilsden v. Mercer*, Cro. J. 676.

[1] See *Van Ness v. Hamilton*, 19 Johns. R. 368.

and that therefore he published the words; and the plea was held bad (*f*), because it was not averred that the plaintiff continued a bankrupt to the time of publishing the words, for he might afterwards recover his credit in trade.

In *Fysh v. Thorowgood* (*g*), the plaintiff declared "that a commission issued out of the Exchequer, directed to the plaintiff and one J. S. by force whereof they took and returned the examinations of several witnesses, and that thereupon the defendant said, that the plaintiff had returned as depositions the examination of *divers* that were never sworn." The defendant pleaded in bar, that he did return the examination of one J. S. who was never sworn. Upon demurrer, it was adjudged that this was no good justification in bar, because it is of one witness only, whereas the charge was in the plural number.

Where the declaration alleged that the plaintiff was lawfully possessor of mines and ore gotten and to be gotten from them, and was in treaty for the sale of the ore; and that the defendant published a malicious, injurious, and unlawful advertisement, cautioning persons against purchasing *the ore *per quod* he was [*482] prevented from selling it; plea, that the adventurers or persons having an interest or share in the mine, thought it their duty to caution persons against purchasing the ore, &c., as persons purchasing such ore would be called on for the amount, and that a bill in equity was about to be filed by the adventurers; it was held, on special demurrer, that the plea was insufficient, both because it did not disclose the names of the adventurers, and show who they were; and secondly, because it did not show that the defendant, in publishing the advertisement, acted under the authority of the adventurers (*h*).

So it was held, that a plea that the plaintiff had been confined in England on a charge of high treason, was not supported by proof that the plaintiff had been apprehended by virtue of a warrant from the Duke of Portland, one of the secretaries of state, on suspicion of high treason (*i*).

(*f*) *Upsheer v. Betts*, Cro. J. 578.

(*g*) Cro. Eliz. 623.

(*h*) *Rowe v. Roach*, 1 M. & S. 304.

(*i*) *Bell v. Byrne*, 13 East. 554.

Where the libel charged the plaintiff with acts of barbarity to a horse, and that one of its eyes was literally knocked out, and that the plaintiff had ordered a person who had the care of it not to let any person see it; and issue was taken, on a general [*483] plea that the statement was true, and the "jury negatived the fact of knocking out the eye, but found for the defendant as to the rest; the court held that the plaintiff was entitled to the verdict (*j*).

But it is sufficient if the substance of the libellous charge be justified.

The supposed libel (*k*) alleged that a serious misunderstanding had taken place among the independent dissenters of M. and their pastor, in consequence of some personal invectives thrown from the pulpit by the latter, and that the matter was to be taken up seriously. The defendant in his plea alleged that the plaintiff, whilst officiating as minister, published from a part of the chapel, in the presence of his congregation, of and concerning one M. F. the teacher of a Sunday school, the scandalous words following: "I have something to say which I have thought of saying for some time, namely, the improper conduct of one of the female teachers: her name is Miss Fair; her conduct is a bad example and disgrace to the school; and if any of the children dare to ask her to go home, she shall be turned out of the school and never enter it again: Miss

Fair does more harm than good, and thereby gave great [*484] offence to divers of the dissenters, to wit one—*and one —and occasioned a serious misunderstanding amongst the dissenters." After a verdict for the defendant, the court held that the plea was an answer to the declaration, although the libel alleged a misunderstanding to have taken place between the pastor and his congregation, whilst the justification alleged the misunderstanding to have taken place among the congregation only.

Care should be taken to apply the justification where the matter of justification admits of it, to the whole of the imputation contained in the declaration. If any part be left uncovered, the plaintiff will, on proof of the words or libel stated (or without proof, if the gene-

(*j*) *Weaver v. Loyd*, 2 B. & C. 678. (*k*) *Edwards v. Bell*, 1 Bing. 403.

ral issue be not pleaded), be entitled to damages in respect of that part of the charge to which the justification is not pleaded, even although such justification might have been pleaded to the whole charge. The plaintiff declared for these words (*inter alia*), he (meaning the plaintiff,) has robbed me to a serious amount; the defendant pleaded the general issue; and as to the words, "He has robbed me," pleaded that the plaintiff had on such a day, robbed him of a loaf of the value of three pence; the plaintiff proved the words as laid; the jury found the justification as pleaded, but were directed by the learned judge who tried the cause, to give some damages in respect of the words which were not justified; and they found a verdict *for the plaintiff, with forty shil- [*485] lings damages. The court (*l*), afterwards discharged a rule nisi, which had been obtained for entering judgment for the defendant, *non obstante veredicto*. It would be proper, in such a case, to plead the justification to the whole of the words, and to aver that the plaintiff had robbed the defendant to a serious amount, alleging the robbery according to the facts; this would raise the question, of fact, as it seems rather than of law, whether, as alleged, the robbery was to a serious amount.

Where the defendant pleads in justification, that the alleged libel is a fair report of a judicial proceeding, he ought to shew in his plea that he has given a true and accurate report of the proceeding.

And it is not sufficient to allege that the alleged libel is in *substance* a true and accurate report. For the substance is nothing more than the inference which the publisher of the libel has drawn from what passed at the trial (*n*), it ought to be shewn that the report is a true and accurate report, or at least that no necessary matter has been omitted, in order that the court may, on *demurrer, be able to decide whether it was lawful to [*486] publish that report (*n*).

(*l*) Bayley and Holroyd, Js. in the C. P. Lancaster.

(*n*) Flint v. Pike, 4 B. & C. 473.

(*n*) See the observations of Littledale, J. in Flint v. Pike, 4 B. & C. 473. In the case of Duncan v. Thwaites, 4 B. & A. 612, Abbott, C. J. said, "If a party is to be allowed to publish what passes in a court of justice, he must publish the whole case, and not merely state the conclusion which he himself draws from the evidence."

Besides, the plea would neither deny that the libel was published with the malicious motives alleged in the declaration, nor would it shew to the court that it was necessary that the public should be made acquainted with the matter stated in the alleged libel. The plaintiff declared on a libel which professed to give a short summary of a trial of an action, and after that summary, to give an outline of the speech of the counsel for the defendant in that cause; and the libel set out part of a speech, containing severe reflections on the conduct of the plaintiff, the attorney for the plaintiff in that cause; the defendant pleaded that the alleged libel was, in substance, a true report of the trial. But the court, upon a general demurrer, gave judgment for the plaintiff (*o*).

So again, where the plaintiff declared on a libel in a public newspaper, which purported to contain a true account of the speech of a counsel, upon an indictment for a conspiracy; the report, *after setting out the speech, added, “ the first witness called was R. P. who proved all that had been stated by the counsel for the prosecution; and then stated, that in consequence of another witness being unable to prove a deputation from the under sheriff, the jury, under the direction of the court, were obliged to give a verdict of acquittal. The defendant pleaded (*inter alia*) that, at the trial of the indictment, the counsel for the prosecution made the speech set out in the supposed libel; and that having so stated the facts, the said R. P., by his testimony, proved all that had been so stated by the counsel for the prosecution, and then alleged the inability of the other witness, &c., and the consequent acquittal. And, upon a general demurrer, it was held that the plea could not be supported: the publication, to be justifiable, ought to have stated the evidence, in order that those who read the report might judge for themselves; and if a party is to be allowed to publish what passes in a court of justice, he must publish the whole case, and not the conclusion which he himself draws from the evidence (*p*).

Where the defendant justifies the speaking of the words, or pub-

(*o*) Flint v. Pike, 4 B. & C. 473.

(*p*) Lewis v. Walter, 4 B. & A. 605.

lishing the alleged libel in the course of a parliamentary or judicial proceeding, he *must shew, in his plea, that [*488] he has been guilty of no publication, which the nature of the proceedings did not call for, or, at least, care must be taken that no publication, stated in the declaration, is left unprotected by the matter of justification pleaded. The defendant (*q*) had exhibited his bill in the Star Chamber, alleging that the plaintiff was a procurer of murders and piracies; the declaration alleged the exhibiting of the bill, and that the said defendant, at B., in the county of Salop, said, that the said bill and the matters contained therein, were true. The defendant, in his plea, confessed the exhibiting of the bill in the Star Chamber, and that he, in the said court at Westminster, spoke the said words *absque hoc*, that he spoke the words in the county of Salop before or after the day mentioned in the declaration, by which he excluded the day itself, for which reason the plea was held to be insufficient. But judgment for the plaintiff in this case was afterwards reversed, upon writ of error in the Exchequer Chamber, because the defendant had asserted in the county of Salop nothing more than that the matters contained in the bill were true, without specifying the contents of the bill.

Where the alleged libel was contained in a petition to the members (*r*) of a committee of the *House of Com- [*489] mons, the plaintiff, in his declaration, alleged generally that the defendant had published the libel to "divers subjects." The defendant justified the publication to divers persons being members of the committee, and averred it to be the same publishing of which the plaintiff had complained, and the plea was held sufficient. But it seems, that if the plaintiff, in his declaration, allege a publication to divers people by name, if the defendant justify the publication to some of them by name, he must traverse a publication to the rest.

And the reason of the distinction is, that in the former case, where a general publication to divers subjects is alleged, the plea that he published to divers subjects, being members of the committee, is consistent with the declaration, and therefore with the averment that

(*q*) *Buckley v. Wood*, 4 Co. 15.

(*r*) *Lake v. King*, 1 Saund. 120.

the publication is the same. But if the plaintiff declare of a publication to A. B. C. and D., the defendant, in justifying a publication to A. and B., cannot aver it to be the same publication with that complained of but should traverse the publication to C. and D. (s).

Where part of a publication consists of a report of judicial proceedings and the rest of comment, since the separation is necessary for the *purpose of defence, the defendant ought (t) to take upon himself the burthen of making it, in order that the court may see what parts he means to justify. And if he does not, the court will not allow him to amend his plea.

A plea of justification, however, may be good, with a general reference to certain parts of the libel set forth in the declaration, if the court can see with certainty what parts are referred to; as if the reference be to so much of the libel as imputes to the plaintiff such a crime as perjury, that would be sufficient without repeating all those parts again, which would lead to prolixity of pleading and ought to be avoided (u).

The defendant may, under the statute (x), by leave of the court, join a general plea of not guilty to the whole declaration, with a plea of special justification to the whole or part (y). Thus he may justify so much as imputes to the plaintiff the commission of a specific crime, as perjury (z). And he may plead not guilty, as to part of the words, and justify as to the residue (a).

[*491] *When the words, as stated on the record, appear to be demurrable, it may be useful to recollect the rule which Sir E. Coke (b) termed “an excellent point of learning in actions for slander,” namely, “observe the occasion and cause of speaking them, and how it may be pleaded in the defendant’s excuse. When the matter in fact will clearly serve for your client, although your opinion is, that the plaintiff has no cause of action, yet take heed you do not hazard the matter on a demurrer, in which, upon the

(s) See 1 Will. Saund. 133, n. 4, and 22, n. 2.

(t) 7 East. 493.

(u) Per Le Blanc, J. 7 East. 507.

(x) 4 Ann. c. 16.

(y) See Tidd 603. 4 edit.

(z) Styles v. Nokes, 7 East 493.

(a) Rich v. Holt. Cro. J. 267.

(b) 4th Rep.

pleading and otherwise, more perhaps will arise than you thought of; but first take advantage of matters of fact, and leave matters of law, which always arise upon the matters of fact *ad ultimum*, and never at first demur in law, when, after the trial of the matters in fact, the matter in law will be saved to you."

CHAPTER XVII.

OF THE REPLICATION.

[*492] *It seldom happens that any thing can be replied to the defendant's special plea, except the general replication of *de injuriâ propria*, &c. which puts the whole of the defendant's plea in issue (*a*).

In some instances, however, a special replication becomes necessary. As, where the original slander imputes to the plaintiff the commission of a specific crime, and the defendant pleads in justification that the plaintiff was really guilty, the plaintiff may reply, that, after his commission of the crime, and before the speaking of the words, he was pardoned (*b*).

And it has been said, that in such case it makes no difference whether the pardon be a special one, of which the defendant was ignorant, or a general one, since a man who takes upon himself to spread slander, does it at his peril; but that if a man who had committed felony, secretly procure a pardon, and another, not knowing of *the pardon, cause him to be apprehended for felony, he would be justified, because what he did was for the advancement of justice.

But where the pardon is general, containing clauses of exception, it seems the plaintiff should aver that his case does not fall within any of the exceptions (*c*).

(*a*) 1 Saund. 244, n. 7.
(*c*) Hob. 67.

(*b*) Cuddington v. Wilkins, Hob. 81.

And even after a pardon, if the defendant merely say that the plaintiff was a thief, the pardon (*d*) will not be available.

Where the plaintiff has stated the publication, generally, to have been made to divers persons, not naming them, and the defendant justifies the publication to particular persons, as to the members of a committee of the House of Commons, if the plaintiff mean to insist upon a publication to any others, he should state such publication by way of new assignment (*e*).

(*e*) See 1 Saund. 133, and Chitty on Pleading 603.

(*d*) Hob. 82.

A
TREATISE
ON THE
LAW OF SLANDER
AND
LIBEL,
AND INCIDENTALLY OF
MALICIOUS PROSECUTIONS.

Nescit vox missa reverti.

By THOMAS STARKIE, Esq.

OF LINCOLN'S INN, BARRISTER AT LAW.

FROM THE SECOND ENGLISH EDITION OF 1830,
WITH NOTES AND REFERENCES TO AMERICAN CASES AND TO ENGLISH DE-
CISIONS SINCE 1830.

By JOHN L. WENDELL,

COUNSELLOR AT LAW.

VOL. II.

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CHAPTER I.

OF THE EVIDENCE.

THE natural order of the evidence, in an action for slander, [*1] on the part of the plaintiff, where the general issue has been pleaded, is

1st. Of special character and extrinsic facts, when they are essential to the action.

2dly. Of the act of speaking the words or publishing the libel.

3dly. Of the truth of the colloquium and innuendos.

4thly. Of the defendant's malice and intention, where malice in fact is material.

5thly. Of the damage.

First, as to the proof of special character, and other extrinsic facts.

Where the special character is essential to the action, it is alleged either generally or particularly.

When it is generally alleged, it is usually sufficient to prove, by general evidence, that the plaintiff is in the actual possession of the office or situation in which he has been defamed, without *strict proof of any legal inception or investment. [*2]

For in an action against a mere wrongful invader or disturber, a party is not to be put to the hazard or peril of giving detailed and conclusive proof of his title; and it is to be presumed, till the contrary be shown, that he acted legally.

And, therefore, where a plaintiff avers generally that he filled any particular situation or office, in which he has been calumniated, or that he exercised any particular profession or business, it is sufficient to give general evidence of his having acted in that office or

situation, or of his having exercised that particular profession, or carried on that trade or business. If the declaration allege that the plaintiff was, at the time of the alleged injury, a magistrate or peace officer (*f*), it is sufficient to show that he previously acted as such. If it allege that the plaintiff was an attorney of such a court, it is sufficient to show that he was before and at the time, practising as an attorney of that court (*g*). It has indeed been *doubted, [*3] whether, under an allegation that the plaintiff was at the time of the alleged slander a physician, it was necessary to produce a diploma; and the judges of the Court of Common Pleas were equally divided upon this question (*h*).

(*f*) Per Buller, *J. Berryman v. Wise*, 4 T. R. 366. *Gordon's case*, Leach 581. *R. v. Shelly*, Leach, 581.n.

(*g*) *Berryman v. Wise*, 4 T. R. 366. *Starkie on Evidence*, part iv. 372. In the case of *Berryman v. Wise*, 4 T. R. 366, the plaintiff averred that he was an attorney of the Court of King's Bench, and having been employed in a particular cause, had received a certain sum of money, which the defendant charged him with swindling, adding a threat, that he would move the court to have him "struck off the roll of attorneys." Upon the trial before Thomson, Baron, at the York assizes, the plaintiff proved the words, and his having been employed as an attorney in that and others suits. It was objected that the plaintiff had not proved the first allegation, in his declaration, viz. that he was an attorney of the Court of King's Bench, which could only be proved by his admission, or by a copy of the roll of attorneys; but the objection was overruled, the learned judge reserving the point with liberty to move to enter a nonsuit. Upon motion made to that effect, the court were of opinion, that the evidence was sufficient, for the defendant's threat imputed that the plaintiff was an attorney. And Buller, J. said, in the case of all peace officers, justices of the peace, constables, &c. it is sufficient to prove that they acted in those characters, without proving their appointments, and that even in case of murder. Excise and custom-house officers, indeed, fall under a different consideration, but even in their case, evidence was admitted, both in civil and criminal suits, to show that the party was a reputed officer prior to the 11th G. I. c. 10. s. 12.

(*h*) *Smith v. Taylor*, 1 N. R. 196. In the previous case of *Pickford v. Gutch*, Cor. Buller, J. *Dorchester assizes*, 1787, the action was brought for calling the plaintiff a quack. The declaration alleged that the plaintiff had used and exercised the profession, &c. of a physician, &c. To prove this, a person who was a surgeon and apothecary was called, who would have proved that the plaintiff for several years had prescribed, &c. as a physician, and that the witness had acted under him. But Buller, J. was of opinion that the evidence was insufficient, and that it was necessary to produce the plaintiff's diploma: on which it was produced in court, and the plaintiff recovered.

*The declaration stated, that the plaintiff, at the time of speaking the words, was "a physician." Upon the trial of the cause before Sir J. Mansfield, C. J. it was proved that the [*4] plaintiff had practised for some years as a physician in the town of Yarmouth; that Dr. Girdlestone, who was also a physician at Yarmouth, and of longer standing than the plaintiff, had been attending one Richard Helsden as a patient, and that the defendant was employed as his apothecary. That Dr. Girdlestone being obliged to leave Yarmouth for a day, the plaintiff was sent for, at the request of Helsden's wife, and prescribed for him; the prescription was made up by the defendant. On Dr. Girdlestone's return, the plaintiff requested that he might be sent for; Dr. G. refused, and the defendant then, with reference to the transaction, said, "I and Dr. G. both thought that Helsden was doing well, till Mrs. Helsden called in Dr. Smith, who has upset all that we have done, and die he (Helsden) must." *Moises v. Thornton* was cited, on the part of the defendant, to prove it to be necessary for the plaintiff to show *that he was a *regular physician*. His lordship [*5] was of opinion, that the case was irrelevant, and the plaintiff obtained a verdict for £100. The case was afterwards argued on a rule to show cause why the verdict should not be set aside, and a new trial had; and the learned judges not being agreed, delivered their opinions *seriatim*, Sir J. Mansfield, C. J. and Heath, J. agreeing that the plaintiff was entitled to recover without further proof; and Rooke and Chambre, Justices, conceiving it to be requisite for the plaintiff to prove that he was lawfully authorized to practice. As the court were equally divided, the plaintiff of course retained his verdict.

The argument for the necessity of proving a regular diploma in that case, seems to resolve itself principally into the question, whether, where a statute prohibits the entering in a particular situation or office, without some particular previous qualification, it be necessary in an action by a party aggrieved, in that character, to prove such qualification; for no precise form is essential to the constituting a physician (i); and physicians were contemplated and recognized

(i) See 5 Com. Dig. tit. Physician.

by the law as such, before the passing of the statute, which made particular qualifications *essential to the legal exercise of [*6] their profession. On general legal principles, it seems, that no such proof is essential; for in general, it is to be presumed, that a party who acts in a particular situation, acts legally in that situation, and that he has conformed to and not violated the law in so acting. This presumption is made in favor of innocence, even where the plaintiff seeks to enforce a civil contract, which would not be valid without such conformity (*k*). A *fortiori* the presumption ought to be made against a mere wrong-doer (*l*).

It has been expressly decided, that an attorney in an action for a libel upon him, in his professional character is not bound to prove that he has duly taken out his certificate according to the statute (*m*) [1].

[*7] *In the subsequent case of *Pearce v. Whale* (*n*), the court held that it was not sufficient for the defendant to

(*k*) As in an action on an attorney's bill, see Starkie on Evidence, tit. Attorney. By the express provisions of the statute 55 G. 3, c. 191, s. 21, an apothecary cannot recover for business done without proof of qualification, but that is by the express provision of the statute.

(*l*) See Starkie on Evidence, iv. 1249.

(*m*) *Jones v. Stevens*, Exch. Trin. T. 1822, 11 Price 235. It was held, in that case, that an attorney might recover for a libel upon him in his professional character, even although evidence was given on the part of the defendant, that no certificate had been taken out by the plaintiff, from Nov. 1813 to Nov. 1814; or from Nov. 1821 to Feb. 1822, when the last certificate was obtained, and that the plaintiff had, during those periods, practiced as an attorney; notwithstanding this evidence, the court held that although the plaintiff might be disabled by the stat. 37 G. 3, c. 90, from maintaining any action for fees, yet that he did not, by the omission, entirely lose his character of an attorney, and was not to be subjected, in addition to the penalty and disability imposed by the statute, to be aspersed and reviled in that character. But note, that no negative evidence was given to show that the plaintiff had not been re-admitted. See *Pearce v. Whale*, 5 B. & C. 38.

(*n*) 5 B. & C. 38.

[1] In an action by a *physician* for words imputing want of skill, it was held that proof that he had practiced in his profession with reputation for several years, was sufficient evidence of his being a physician. Digest of South Carolina Reports, p. 163. See also *McPherson v. Cheadell*, 24 Wendell, 24, and *Finch v. Gridley's exrs.* 25 Id. 469.

show that the plaintiff, who sued as an attorney for fees, had neglected to take out his certificate in previous years, without also giving evidence to negative his re-admission as an attorney.

But although the allegation of character be general, yet if there be reason to apprehend that the defendant means to dispute the plaintiff's title to the office, situation, or other special character to which the slander or libel relate, it would be prudent to be prepared with the best evidence to establish the fact. For although the proof of the negative might lie, in the first instance, on the defendant, yet such evidence might be offered as would suffice to establish the negative in the *absence of affirmative proof, the [*8] more especially if the plaintiff was apprized of the defendant's intention to dispute the plaintiff's title to the special character.

But where the plaintiff himself specifies the particular mode in which he was invested with the particular character in which he has been injured, he must, it seems, prove such a descriptive allegation, with its circumstances although a more general allegation would have been sufficient. For though a totally irrelevant allegation may be rejected as surplusage, one which is material to the cause of action, and which is descriptive of the legal injury, must be proved as laid (*p*).

(*p*) The rule in principle seems to be this, that if the plaintiff, instead of averring his special character generally, merely alleges the mode of appointment or investment, he must prove the fact, for, being material to the right of action, it cannot be rejected; if it were rejected, no sufficient cause of action would be alleged. But where the plaintiff alleges his appointment cumulatively, as if he allege that he is an attorney, and has been duly admitted, &c. or that he is a physician, and has taken his degree, &c. it may well be doubted whether, in principle, strict proof of his admission or diploma be necessary. For such allegations may be regarded as *cumulative* rather than *descriptive*, and there seems to be no reason why, in such a case, the legal investment, by admission or otherwise, should not be presumed from evidence that the party has acted in the particular character. If it is to be presumed, from such evidence, that the party is an attorney, why is it not also to be presumed that he has been admitted an attorney. The latter presumption indeed necessarily involves the former; a presumption of a particular fact necessarily includes the presumption of every thing which is essential to that fact, and without which it could not have been.

[*9] *The defendant (*q*) said of the plaintiff, "He is a quack, and if he shews you a diploma, it is a forgery."

The declaration averred that the plaintiff "was a physician, and had regularly taken his degree of doctor of physic."

In support of this averment, he produced a diploma, purporting, on the face of it, to have been granted by the University of St. Andrew's, in Scotland, and to have the University seal appendant to it. To authenticate this, a witness was offered, to prove that the rector and professors of the University of St. Andrew's had acknowledged, in his presence, their signatures, subscribed to the diploma. The same witness was ready to prove a certificate, by the master and professors, of the due taking of the degree, and an acknowledgment by the seal-keeper of the University, that the seal appendant to the diploma was the seal of the University. Lord

Kenyon, C. J. deeming this evidence to be insufficient,
[*10] the plaintiff was nonsuited. A motion for a new *trial was afterwards refused, on the ground, that the plaintiff having averred that he had duly taken the degree of doctor of physic, he was bound to prove it; and it was observed, by Lawrence, J. "even if it be not necessary in general, for the party to show that he has taken his degree, in this case it is necessary on account of the plaintiff's allegation."

Lord Kenyon, C. J. observed, that the best evidence to prove the taking of a degree is by the production of the books containing the act of the corporation by which the degree is conferred.

But, in general, if the slander or libel assume that the plaintiff possesses the character, or fills the situation or office in which he is defamed, or assumes the truth of facts to which the slander or libel relates, and which are averred in the declaration, it operates by way of admission, and no further evidence of the fact is necessary. Thus where the plaintiff, being an attorney, brought his action for words, used by the defendant, by which he threatened that he would have the plaintiff struck off the roll of attornies, it was held that

proof of the plaintiff's being an attorney was unnecessary, for the words imported the fact (*r*) [1].

*The plaintiff alleged that he had been appointed by [*11] certain persons, exercising the powers of government, in a certain republic or state in parts beyond seas, to wit, in the republic or state of Chili, in South America, to the office or station of envoy extraordinary and minister plenipotentiary to and at the courts of Europe, &c.

It was objected, at the trial, that the plaintiff had not proved that there was such a state as Chili, but the defendant having asserted, in the alleged libel that the plaintiff had colluded with J. H., fraudulently to obtain money in the matter of a loan for *the republic or state of Chili*, &c. it was held to be sufficient proof of the existence of such a state (*s*).

Where a libel alleged that certain acts of outrage had been committed, it was held that this was evidence to support an averment of the fact, in the introductory part of the record (*t*).

*In the next place it is necessary to prove all those [*12] prefatory allegations of facts, in relation to which the illegality of the words or libel consists.

Any material variance in the proof of such averments will, it has been seen (*u*), be fatal, although it is otherwise where the alle-

(*r*) *Berryman v. Wise*, 4 T. R. 366; and see *Smith v. Taylor*, 1 N. R. 196. Where the plaintiff alleged, generally, that he was an attorney, and the words were, "He is a pettifogging, blood-sucking attorney;" it was ruled that no extrinsic evidence to prove the plaintiff to be an attorney was necessary. *Armstrong v. Jordan*, Cor. Hullock, B. Carlisle Sum. Ass. 1826.

(*s*) *Yrissair v. Clement*, 3 Bing. 432.

(*t*) See the observations of Bayley, J. in 4 M. & S. 548; and note, that though the information alleged that outrages had been committed *in* and in the neighbourhood of Nottingham, it was held that the allegation was divisible, and that it was not necessary to prove that outrages had been committed in both places.—Ib.

(*u*) *Supra* vol. I, 405.

[1] So where the defendant in imputing a crime to the plaintiff, spoke of him as *The Reverend A. B.*, it was held that the words used were equivalent to an admission, that the plaintiff was a *Clergyman*. *Cummen v. Smith*, 2 Serg. and Rawle 440.

gation of the extrinsic fact is purely immaterial (*x*), or where the prefatory subject matter is in its nature divisible, and so much is proved as would, had it been alleged without more, have been sufficient (*y*).

2dly. As to the fact of publication. Where the action is for words spoken, evidence of the speaking before any third person will be sufficient, though the declaration allege them to have been spoken before A. B. and others (*z*). And where the words are in themselves actionable, it is sufficient to prove some of them which are actionable, provided they be proved as laid (*a*).

If the words be spoken, or libel published, in a foreign [*13] language, or in characters not understood *by those who hear or see them, there is no publication, since there is no communication prejudicial to the plaintiff; and if the words be spoken, or libel addressed, to the plaintiff only, without further publication, no action is maintainable, since no temporal damage can have accrued from the defendant's act (*b*), but a publication to the prosecutor only would be sufficient to sustain an indictment on the ground of its tendency to produce a breach of the peace (*c*).

Where a witness, who has heard scandalous words spoken, has committed them immediately to writing, he may afterwards read the paper in evidence, if he swear that the words contained [*14] in it are the very words (*d*); and if the words have *not

(*x*) Supra ib. 406.

(*y*) Supra ib. 407.

(*z*) B. N. P. 5.

(*a*) 2 East. 434. 8 T. R. 150, supra 309.

(*b*) 1 Will. Saun. 132, n. 2. Phillips v. Janson, 2 Esp. C. 226. and see *Hicks's* case, Hob. 215. R. v. Wegener, 2 Starkie's C. 245.

(*c*) But where a libel, reflecting on the prosecutor in his profession as a solicitor, was sent as a letter, and published to the prosecutor alone, and the indictment alleged that it was published with intention to injure the prosecutor in his profession as a solicitor, it was held (by Abbott, J.) that the indictment could not be supported, and that it should have been alleged to have been published with intent to provoke the prosecutor and excite him to commit a breach of the peace; and that where a letter containing a libel is sent to the wife, it ought to be alleged to have been published with the intent to disturb the domestic harmony of the parties. R. v. Wegener, 2 Starkie's C. 245.

(*d*) Per Holt, C. J. Sandwell v. Sandwell, Holt. R. 295.

been written immediately, the witness may refer to his minutes to refresh his memory (e).

In case of libel, before any evidence can be given of its contents, *prima facie* evidence must be given of a publication by the defendant. Evidence of a publication is either of a publication *generally*, or of a publication in some *particular county* or place, and it is either *direct* or *indirect*.

To support a civil action it is essential, as has already been observed, to prove a publication of the libel to some third person (f) [1]. But where the defendant, knowing that letters addressed to the plaintiff were usually opened and read by his clerk, wrote a libellous letter and directed it to the plaintiff and his clerk received and read it, it was held that there was a sufficient publication to support the action (g).

The publication may be *directly* proved, by evidence that the defendant, with his own hand, distributed the libel, or exposed its contents, or painted an ignominious sign over the door
*of another, or took part in a procession carrying a rep- [*15]
resentation of the plaintiff in effigy for the purpose of exposing him to contempt and ridicule, or by evidence of his maliciously reading or singing the contents of the libel in the presence of others; all of which facts are direct proof of the averment that the defendant published the alleged libel (h). But it frequently happens that no direct proof can be given of the defendant's agency in the publication of the libel, and resort must be had to indirect evidence, in order to connect him with the libel and fix him with its publication. The most usual and important piece of evidence for this purpose consists in proving that the libel published

(e) Holt's R. 295.

(f) Supra vol. 11. 13. Where a libel, contained in a letter folded, but not sealed, was delivered to a third person, to be conveyed to the plaintiff, and was so conveyed without having been read by any one, it was held that no action could be supported. *Clutterbuck v. Chaffers*, 2 Starkie's C. 471.

(g) *Delacroix v. Thevenot*, 2 Starkie's C. 63.

(h) 5 Rep. 125. 9 Rep. 59, b.

[1] So where a sealed letter was delivered to the plaintiff unopened, it was held that the action did not lie. *Lyle v. Clason*, 1 Caines 581.

is in the hand-writing of the defendant; when the plaintiff has proved this, he has made out such a *prima facie* case as entitles him to have the contents read in evidence (*i*).

It was observed by a great authority (*k*), that "When a libel is produced written in a man's own hand, he is taken in the *manner*, and that throws the proof upon him; and if he cannot produce the composer, the verdict will be against him."

The grounds of this presumption are plain and reasonable. [*16] "No man incurs any civil responsibility by what he thinks or even writes, unless he divulge his thoughts to the temporal prejudice of another; but it seems to be equally clear, in point both of law and expediency, that if he write what is false, and the calumny become public to the detriment of its object, he is just as responsible for the effects of his negligence as if he had been the voluntary publisher of the scandal; and that, if a man write libels for his own perusal, he must be content to enjoy the satisfaction, diminished by the risk and peril of an accidental publication and its consequences (*l*).

The writing a libel (*m*) does not, however, in any case, amount to a publication, but is mere evidence from which it may be inferred. What amounts to a publication is usually a question of fact falling within the province of the jury to decide (*n*), and though

(*i*) Burr. 2689.

(*k*) Per Holt, C. J. R. v. Beere, Ld. Ray. 417. Mullet v. Hulton, 4 Esp C. 248.

(*l*) Supra vol. I. 225.

(*m*) Lamb's case. 9 Rep. 59. 15 Vin. Abr. 91. Mod. 813.

(*n*) Baldwin v. Elphinstone, Bl. R. 1037; that is, it is a question for the jury, in doubtful cases, whether there has in fact been any publication of the libel to a third person; but, where the facts are clear, the question of publication is one of law for the decision of the court. If (in an action for damages) the facts were that the defendant had posted up a libel in a public place, but had taken it down again before any one had read it, there would in point of law be no publication; but if it were doubtful whether, before it was taken down some one had not read it, that would be a question of fact for the jury. See Starkie on Evidence, tit. Law and Fact. Delacroix v. Thevenot, 2 Starkie's C. 63. Clutterbuck v. Chaffers, 1 Starkie's C. 471.

proof that the libel is in the *hand-writing (*o*) of the [*17] party, goes far in fixing him with the publication, he is

(*o*) The best evidence to prove the hand-writing in question, is that of a witness who actually saw the party write it ; such direct evidence can, however, seldom be procured ; and, in general, to prove the hand writing of a person, any witness may be called who has by sufficient means acquired such a knowledge of the *general character* of the hand-writing of the party, as will enable him to swear to his *belief* that the hand-writing in question is the hand-writing of that person ; B. N. P. 236. Lord Ferrers *v.* Shirley, Fitzg. 195.

This knowledge of the general character of the party's hand-writing, may have been acquired from having seen him write, although but once, Garrels *v.* Alexander, 4 Esp. C. 37. ; or, if the witness has never seen him write, it is sufficient if he has obtained a knowledge of the character of the hand-writing from a correspondence with the party upon matters of business, or from any other transactions between them, as from having paid bills of exchange according to his written directions, and for which he afterwards accounted. And when letters are sent to a particular person, on particular business, and an answer is received in due course, a fair inference arises that the answer was sent by the person whose hand-writing it purports to be. Per Lord Kenyon, Cary *v.* Pitt, Peake's L. E. 105. For when letters are so written in the usual and ordinary course of business, it is reasonable to presume that they were really written by the person by whom they purport to have been written, and that they have not been fabricated to answer a particular purpose. In such case it is obviously essential, that the identity of the correspondent whose letters have been received, with the party whose hand-writing is to be proved, should be established, either by the witness who received the letters, or by other reasonable evidence.

In the case of Lord Ferrers *v.* Shirley, Fitzg. 195, where the issue was upon the execution of a deed by Lord Ferrers, a witness was called to prove the hand-writing of Cottington, a subscribing witness, who was dead : he stated that his master had held an estate under the late Lord Ferrers, and that he had seen several letters appearing to have been written by Cottington for the rent of the estate, and that his master had told him that they were the letters of Cottington, Earl Ferrer's steward. The court, in this instance, rejected the witness, because he could not prove the identity of Cottington, Fitzg. 195 ; but Lord Raymond said that it was not necessary, in all cases, that the witness should have seen the party write, to whose hand he swears ; for where there has been a fixed correspondence by letters, and it can be made out that the party writing is the same man that attested the deed, it will enable the witness to swear to that person's hand-writing, although he never saw him write. And Page, J. said, if a subscribing witness to a deed live in the West Indies, whose hand-writing is to be proved in England, a witness here may swear to his hand-writing, by having seen the letters of such person, written by him to his correspondent in Eng-

- [18] still at liberty to *rebut the strong presumption thus raised against him, by reconciling the fact with his innocence.
- [*19] *Hand-writing must be proved by those who know the general character of the hand-writing of the party, and
- [*20] not by comparison of hands, for *jurors may not, it is said, be competent to make the comparison (*p*) ; this

land ; because, under the special circumstances of that case, there is no other way, or at least the difficulty will be great of proving the hand-writing of such subscribing witness. The court in this case rejected the testimony, not on account of the insufficiency of the evidence to prove the hand-writing to be that of the person who had written the letters demanding rent, but because the identity of that person with Cottington, the attesting witness, had not been made out.

The mere seeing the superscription of letters, at the post-office, purporting to have been franked by the party, is not a sufficient foundation for this kind of evidence, *Cary v. Pitt*. Peake's Ev. 105. And see *Lord Ferrers v. Shirley*, Fitz. 195, for the superscription may have been forged. A witness who swears to his belief of hand-writing, must form his judgment from his recollection of the general character of the hand-writing of the party, and not from any extrinsic or collateral circumstances. Mr. Caldecot was allowed to state his belief that the hand-writing was not that of Mr. Mickle, the author of the *Luciad*, because he was a very correct man in making capital and small letters where such were required ; and in the writing produced, that correctness was not observed, for the observation arose from the character of the hand-writing itself. See *Dacosta v. Pym*, Appeal. to Peake's L. E.

But in the same case, of *Dacosta v. Pym*, the witness saying that the hand-writing was like the plaintiff's, but that he did not think it was his, because the plaintiff was too much a man of the world to sign such an account ; Lord Kenyon held, that the answer was improper, and that the witness ought to found his opinion upon the character of the hand-writing only.

Where the witness had never seen the defendant (who was sued as the acceptor of a bill of exchange,) write his name, till after the commencement of the action, and then only for the purpose of showing him the difference between his hand-writing and that of the acceptance to the bill, his testimony was held to be inadmissible. 1 Esp. C. 14, 15. Vide 4 Esp. C. 27.

(*p*) By comparison of hands is now meant a comparison by the juxta-position of two writings, in order by such comparison to ascertain whether both were written by the same person ; *Brookbald v. Woodley*, Peake's C. 21. *Macpherson v. Thoytes*, Peake's C. 20. *Stranger v. Searle*, 1 Esp. C. 14. *Goodtitle v. Braham*, 4 T. R. 497. Here it may be observed, that such evidence as is now deemed to be receivable and legal evidence of hand-writing, as distinct from evidence by comparison of hands, seems formerly to have been considered

reason, however, *is not satisfactory ; for if the jurors [*21] cannot read, they may nevertheless receive the evidence

as evidence by comparison of hands, and as inadmissible, at least in criminal cases. In the case of Algernon Sidney, 3 St. Tr. 802. 3 Car. II. two of the witnesses who swore to their belief of his hand-writing had seen him write, and the third had paid bills purporting to have been endorsed by the defendant. Yet the prisoner, in his defence, insisted that nothing but comparison of hand-writing had been offered in evidence against him. And the statute reversing his attainder, recites that there had not been sufficient legal evidence of any treasons committed by him, there being produced a paper found in his closet, supposed to be his hand-writing, but which was not proved by any one witness to have been written by him, but that the jury were directed to believe it by *comparing* it with other writings of his. So also in the celebrated case of the *Seven Bishops*, 4 Jac. II. 4 St. Tr. 338. Sir Thomas Exon stated, that he had never seen the Archbishop of Canterbury write five times in his life, but that he believed one of the signatures on the paper produced to have been written by the archbishop.

Mr. Brookes stated, that he believed another signature to have been written by the Bishop of Ely ; but, upon cross examination, it turned out that his belief was founded upon the resemblance which the writing bore to that contained in a letter sent to the Bishop of Oxford, which letter the witness concluded to have been written by the Bishop of Ely, from having waited upon him with the Bishop of Oxford's answer, and communicated with him on the subject of the original letter.

Upon this evidence, Mr. Justice Powell observed, "That's a strange inference, Mr. Solicitor, to prove a man's hand." Mr. Attorney General—"We have more evidence, but let this go as far as it can." Mr. Serjeant Pemberton—"Certainly, my lord, you will never suffer such a witness as this." Lord C. J. Wright—"Brother Pemberton, I suppose they can prove it otherwise, or else this is not evidence."

After some other evidence had been given, Mr. Justice Powell observed. "Mr. Solicitor, I think you have not sufficiently proved this paper to be subscribed by my Lords the Bishops." Mr. Solicitor General, "Not to read it, sir?"—Mr. J. Powell, "No, not to read it: it is too slender a proof for such a case. I grant you, in civil actions, a slender proof is sufficient to make out a man's hand, by a letter to a tradesman or a correspondent, or the like ; but in criminal cases, (such as this is,) if such a poof be allowed, where is the safety of your life, or any man's life here?"—Mr. Solicitor General, "We tell you a case where it was allowed, and that is Mr. Sidney's case—a case of treason, and printed by authority. We tell you nothing but what was done the other day."

L. C. J. Wright—"I tell you what I say to it: I think truly there is proof

- [*22] *of witnesses who are able to make the comparison. It
 [*23] has also been suggested, *that if such a comparison were
 to be allowed, an unfair selection of specimens might be

enough to have it read, and I am not ashamed nor afraid to say it, for I know I speak with the law, say what you will of criminal cases and the danger of people's lives ; there were more danger to the government, if such proof were not allowed to be good."—Mr. J. Powell—" I think there is no danger to the government at all, in requiring good proof against offenders."—Lord C. J.—" Here's my Lord Archbishop, and the Bishop of St. Asaph, and my Lord of Ely ; their hands are proved ; it is proved to be my Lord Archbishop's writing by Mr. Brookes ; and he proves my Lord of Ely's hand by *comparison*, and so my Lord of Asaph's. Now, brother Pemberton, there's an answer to your objection. It being proved that it is all my Lord Archbishop's hand-writing ; then they come and say, ' We'll prove the hands of the others by *comparison* ; and for that they bring you witnesses, that say, they have received letters from, and seen their hand-writing several times ; and comparing what they have seen with this very paper, says the witness, ' I do believe it to be his hand.' Can there be a greater evidence, or a fuller."—Mr. Serejant Pemberton—" Admit it to be full evidence against my Lord Archbishop ; what's that to the rest ? There's no evidence against them."—Mr. Justice Allybone—" Brother Pemberton, as to the objection you make of comparing hands, it is an objection indeed, I do agree ; but then consider the inconvenience which you and Mr. Pollexfen do so much insist upon. If a man should be accused by a comparison of hands where is he ; he is in a most lamentable case, for his hand may be so counterfeited, that he himself may not be able to distinguish it.—But then you do not consider where you are, on the other side : that may be an objection in matters of fact, that will have very little weight, if compared and set altogether. For on the other side, where shall the government be, if I will make libels, and traduce the government with prudence and discretion, and all the secrecy imaginable : I'll write my libel by myself, prove it as you can. That's a fatal blot to the government, and therefore the cases are not the same, nor is your doctrine to pass for current here, because every case depends upon its own facts. . If I take upon me to swear I know your hand, the inducements are to myself, how I came to know it, so as to swear to it. Knowledge depends upon circumstances ; I swear that I know you, but yet I may be under a mistake, for I can have my knowledge of you no other way but from the visibility of you. And another man may be so much like you, that there is a possibility of my being mistaken : but certainly that is evidence, good evidence. Now here are several gentlemen that swear as to my Lord Archbishop's hand-writing. I do agree as to some of the others, that the evidence is not so strong for what that man said, that he did believe it was rather such a lord's hand, than that which went before, or that which came after, it is of no weight at all, and so some of the others, but it is positively

made for *the purpose of comparison; this, however, [*24]
 would be open to inquiry and observation, and *scarcely [*25]
 seems to be a ground for the total exclusion of such

proved against my Lord Archbishop. And one or two more, so that that's enough to induce the reading of this writing."

Mr. Justice Holloway—"Good, my Lord, let me give my opinion."—Lord C. J.—"With all my heart, brother."—Mr. J. Holloway—"My Lord, I think, as this case is, there ought to be a more strong proof; for certainly the proof ought to be stronger and more certain in criminal matters than in civil matters. In civil matters we do go upon slight proof, such as the comparison of hands for proving a deed, or a witness's name, and a very small proof will induce us to read it; but in criminal matters we ought to be more strict, and require positive and substantial proof, that is fitting for us to have in such a case, and without better proof, I think it ought not to be read."

L. C. Justice—"You must go on to some other proof, Mr. Solicitor, for the court is divided in their opinions about this proof."

The defendant* having committed a riot upon the person of Sir F. W. in his own house, an information was filed against him, and he produced a witness to swear to the contents of a letter from the prosecutor, who deposed it was in the same hand with another letter which had been admitted to be read in evidence. But Holt, C. J. said, "In the case of a deed lost or burnt, we will admit a copy or counterpart, or the contents to be given in evidence; but we never permit it unless it be proved that there was such a deed executed. Now here the witness cannot prove this letter written, for he never had *seen* the prosecutor write," and therefore it was disallowed.

In *Crosby's* case, 12 Mod. 72. Holt, 753. Salk. 689. Ld. Raymond, 39, which was a trial before Holt, C. J. for high treason, several treasonable papers were produced, which the witnesses swore they believed to be in the hand-writing of the prisoner. And on this a question arose, whether *comparison* of hands was evidence. And the court held, that though it was not sufficient for the original foundation of an attainder, it might be well used as a circumstantial and *confirming evidence* †, if the fact be otherwise fully proved, as in *Lord Preston's* case, where it was proved that he attempted to go with certain papers into France, and where they were found upon his person; but that, in the principal case, since they were found elsewhere, to convict on a similitude of hands, would be to run into the error of *Colonel Sidney's* case. Upon this trial, the prisoner produced a copy of the act of parliament for the reversal of *Sidney's* attainder, in which it is declared that the comparison of hands is not legal evidence.

* R. v. Sir T. Culpepper, Holt's R. 293.

† See the cases of *Layer*, Ld. Preston, *Algernon Sidney*, St. Tr. and of *Buchanan*, and *Dr. Hensley*, 1 Bur. 642, and the trial of *O'Connor* and others, at Maidstone.

evidence: and, perhaps, after all, the most satisfactory reason is, that if such comparisons were to be allowed, it would open the door to the admission of a great deal of collateral evidence, which might branch out into a very inconvenient length; for, in every case, it would be necessary to go into distinct evidence, to prove each specimen produced to be genuine; and even in support of a particular specimen (if the present rule were to be broken through) evidence of comparison would be receivable in order to establish the specimen, and so the evidence might branch out to an indefinite extent. The ordinary practice is seldom attended with inconvenience: for if the hand-writing be not that of the party, it is more easy for him to disprove it than it would be for his adversary to prove it in case it were genuine; for it must be within his own peculiar knowledge

what witnesses have so intimate an acquaintance with
 [*20] his hand writing as to be able to prove the "forgery; but where it is genuine his adversary has the witnesses to seek for. It cannot, however, be denied, that abstractedly, a witness is more likely to form a correct judgment as to the identity of hand-writing, by comparing it critically and minutely with a fair and genuine specimen of the party's hand-writing, than he could be able to make by comparing what he sees with the faint impression made by having seen the party write but once, and then, perhaps, under circumstances which did not awaken his attention.

In some instances, where the antiquity of the writing makes it impossible for any living witness to swear that he ever saw the party write, comparison of hand-writing with documents known to be in his hand-writing has been admitted (q).

In the case of *Twent v. Graham* (r), a clerk from the post office, who had been employed to inspect franks and detect forgeries, was admitted on a trial at bar to give his opinion, as a matter of skill and judgment, whether a will was written in a natural or imitated character. He admitted, in his examination, that he had never detected an imitation of the hand-writing of an old person

[*21] who wrote with difficulty, and who might be supposed

(q) *Hy Le Blanc, J. Rose v. Rawlings*, 7 East. 262, B. N. P. 266. See also *Taylor v. Cooke*, 8 Price 263.

(r) 4 T. R. 497

frequently to stop; and that he judged principally by seeing whether the letters were what is called painted, or passed over by the pen a second time, which might happen to any person from a failure of ink. After giving it as his opinion that the will was not genuine, a paper was produced, admitted to have been written by the person suspected of having forged the will, and he was asked his opinion whether that paper and the will had been written by the same person, and the question was objected to, but admitted by the court. But, in the case of *Cary v. Pitt* (s), Lord Kenyon refused to admit the testimony of an inspector of franks at the post office, to prove that the hand-writing of the acceptance of a bill of exchange purporting to be the defendant's, was genuine; saying, that although such evidence had been received in the case of *Revett v. Braham* (t), yet that, in his charge to the jury, he had laid no stress upon it. And in the case of the *King v. Cator* (u), an inspector was admitted to swear (v) that the libel was written in a disguised hand; but he was not allowed to give his opinion upon a comparison of the libel with [*23] another writing, whether they had been written by the same person.

The same rules which apply to the proof of handwriting in civil, apply also to evidence in criminal proceedings (x), although, formerly, the rule in criminal cases was more rigid than in civil actions (y) [1].

(s) Peake's L. E. Append.

(t) 4 T. R. 497.

(u) 4 Esp. C. 117.

(v) In a late case, evidence of the opinion of an inspector of franks at the post office, whether the writing was in a natural or imitated character, was held to be of so little weight, that the court of K. B. refused to grant a new trial, on the ground that such evidence had been rejected at the trial, *Gurney v. Longlands*, 5 B. & A. 360.

(x) *Francis's case*, 6 St. Tr. 70. *Loyers case*, 1311. 275. R. v. Hensey, 1 Burr. 644. *Ld. Preston's case*, 4 St. Tr. 446. *De La Motte's case*, Howell's Eq. 2 T. R. St. Tr. vol. 21. 816. *The Attorney General v. Le Marchant*, 2 T. R. 201, note (a), B. N. P. 236. *R. v. Cator*, 4 Esp. C. 117.

(y) Per Kelynge, C. J. *Carr's case*, and 4 St. Tr. 333.

[1] See a number of cases in the American Courts on the subject of proof by comparison of hand-writing, in *PEAKE'S Ev.* by NORRIS, p. 157. n.

See also *Southwick v. Stevens*, 10 Johns. R. 443, and *McCorkle v. Binns*, 5

The wilful and intentional delivery of a libel, by way of sale or otherwise, as by a bookseller or hawkers, is a sufficient publication, though the party so publishing did not know the contents (z). *So a printer is liable, though he printed a libel in the way of his trade (a).

A defendant may be guilty of publishing a libel not only by distributing copies of it with his own hand, but by employing an agent for the purpose (b).

The declaration generally avers, that the defendant published and caused to be published; but the latter words seem to be perfectly unnecessary, either in a civil or criminal proceeding; in civil proceedings, the principal is to all purposes identified with the agent employed by him to do any specific act, and in treason and misdemeanors (c) all accessories are considered as principals.

A consent by the master to the act of the servant in printing a libel, is *prima facie* evidence of a publication by the master (d).

*An allegation that the defendant published the libel [*20] is satisfied by proof that it was published by his agent (e) if an authority from the principal to the agent can be proved; and although an authority to commit an unlawful act will not in general be presumed, yet it is otherwise in the case of book-

Binney 340, as to witnesses proving a newspaper from its appearance, &c. to be the paper published by the defendant.

(z) Wood's Inst. 431. Moore 627. It is said, "It is not material whether the person who disperses libels is acquainted with their contents or otherwise, for that nothing would be more easy than to publish the most virulent papers with the greatest security, if the concealing the purport of them from an illiterate publisher, would make him safe in dispersing them. And that, on this foundation, it has been constantly ruled of late, that the buying of a book or paper containing libellous matter, at a bookseller's shop, is sufficient evidence to charge the master with the publication, though it does not appear that he knew of any such book being there, or what the contents thereof were, and that it will not be presumed that they were brought there by a stranger; but the master, if he suggests any thing of this kind in his excuse, must prove it." Bac. Ab. tit. Libel, 458.

(a) R. v. Dover, 16 C. II. 2 St. Tr. 547, Hargreave's ed.

(b) 7 East. 65. Bac. Ab. tit. Libel, 458. (c) 2 Hale's P. C. 613.

(d) R. v. Harris, 2 St. Tr. 1039. See Ld. Camden's observations in *Entick v. Carrington*, 11 St. Tr. 322. (e) Hale's P. C. 613.

sellers and others, where the book or libel is purchased from an agent in the usual course of trade (*f*).

(*f*) *Bac. Ab. tit. Libel*, 458. The following are the principal cases which have been decided on this point. In *Elizabeth Nutt's case*, *Fitzg.* 47. 2 G. 2. the defendant was tried on an information for publishing a treasonable libel. It appeared in evidence that the defendant kept a pamphlet shop, and that this libel was sold in the shop by the defendant's servant, for the defendant's use and account, in her absence, and that she did not know the contents of it, nor of its coming in or going out; and per *Raymond, L. C. J.* notwithstanding the defendant is guilty of publishing this libel, the shop being kept under her authority and direction; it would be a very dangerous thing that the law was otherwise, and it has been so ruled in a great many instances. But the jury being unable to agree in a general verdict, and thinking it a hard case upon the defendant, refused to find a general verdict, and were desirous of finding the facts specially; and ultimately, the Attorney-General agreed to withdraw a juror, which was done. According to the report of the same case in *Barnardiston* 306, the Lord Chief Justice observed, that if a servant carries a libel for his master, he certainly is answerable for what he does, though he cannot so much as write or read. It is impossible not to dissent from this doctrine so expressed, without the qualification added, that the servant had some reason to know that he was discharging an illegal mission.

In the case of the *King v. Dodd*, 2 Sess. 33, on an information for selling and publishing a libel against Chambers, it was insisted upon, for the defendant, that she was sick, and that the libel was taken into her house without her knowledge. But, by the court, this is no excuse, and the law presumes her to be acquainted with what her servant does. *Mr. J. Fortescue* said, that it had been ruled, that the finding a libel on a bookseller's shelf was a publication of it by the bookseller. And *L. C. J. Raymond* said, it hath been ruled that where a master being out of town, his trade is carried on by his servant, the master shall be chargeable with the servant's publishing a libel in his absence.

In the case of the *King v. Almon*, 5 Barr. 268, the liability of booksellers was much discussed, and the court expressed an opinion that the sale of a libel in a bookseller's shop, was *prima facie* evidence of a publication, though not so *conclusive* but that it might be rebutted by circumstances. It does not indeed appear what would have been deemed by the court, to be sufficient to rebut such *prima facie* evidence, and to excuse the owner: but it seems to be clear, from the general context of the decisions on this subject, that a bookseller is considered as standing in a situation of peculiar responsibility, and that he is liable criminally as well as civilly, for libels sold in his shop in the usual course of business, though without his particular knowledge.

The defendant had been convicted of publishing a libel (one of Junius's letters) in one of the magazines, called the *London Museum*, which was bought at his shop, and purported to be printed for him.

[*31] *The sale by an agent in a shop in the usual course of business is *prima facie* evidence of a publication with the

The defendant was found guilty on proof that the libel in question had been sold in his shop. A motion was afterwards made for a new trial, on an affidavit, the principal bearing of which was, that the libel had been sent to his shop, and sold there by a boy without his knowledge, privity, or approbation. But the court were of opinion, that none of the matters on behalf of the defendant, nor all of them added together, were reasons for granting a new trial, whatever weight they might have in extenuation of his offence, and in consequence lessening his punishment; for they were extremely clear and unanimous in opinion, that this libel, being bought in the shop of a common known bookseller and publisher, importing by its title-page to be printed for him, was a sufficient *prima facie* evidence of its being published by him; not indeed conclusive, because he might have contradicted it, if the facts would have borne it by contrary evidence.

In the above case, Lord Mansfield observed, "A libel cannot be read against a defendant before it has been proved upon him. This must, however, be understood of such *prima facie* proof of publication as would be sufficient to be left to a jury; for no evidence on the part of the plaintiff or in support of a prosecution, can in strictness amount to proof, since the evidence of any witnesses, is always liable to be rebutted by opposite testimony, and must after all depend for its effect upon the credit given by the jury to the character of the witnesses, and the circumstances under which such evidence is given." Aston, J. observed, that the evidence of his publishing that which was bought in his shop, must stand till the contrary appears. There may, indeed, (he said) be circumstances of extenuation, or even of *exculpation*, and if it were a surprise upon him, the court would have regard to such circumstances as far as they merited their regard, and he cited Harris's case, 5 St. Tr. 1037. Hudson's case, Hil. 3 G. 1, and R. v. Nutt, Fitzg. 47. Harris's case, it is observable, is little to the point; there was evidence that the defendant gave directions for printing the libel; that it was afterwards sold in his shop, and that he had acknowledged the publication.

In the King v. Walter, 3 Esp. C. 21, Lord Kenyon held, that the proprietor of a newspaper was answerable criminally as well as civilly, for the acts of his servants or agents in misconducting a newspaper; he said, that this was not his opinion only, but that of Lord Hale, Justice Powell, and Justice Foster, all high law authorities, and to which he subscribed. This he added, was the old received law for above a century, and was not to be broken in upon by any new doctrine upon libels. The same doctrine is said to have been held in the case of the King v. Cuthel, K. B. 1799, and by Lord Ellenborough, C. J. in R. v. White, Guildh. 1811. See Holt's Law of Libel. 287. The sale of every separate copy of a libel is a distinct offence, R. v. Carlile, 1 Chitty, 453.

knowledge and privity of the *owner ; and although it be [*32]
 not conclusive evidence, yet it throws upon him the ne-
 cessity of *rebutting the presumption by evidence to the [*33]
 contrary (*g*), even although the principal lives at a dis-
 tance from his shop (*h*). But the defendant *may rebut [*34]
 the presumption, by evidence that the libel was sold con-
 trary to his orders, or clandestinely ; or that some deceit or surprise
 was practiced on him (*i*) ; or that he was absent under circumstan-
 ces which entirely negative any presumption of privity or conni-
 vance (*k*) [1] [*a a*].

(*g*) Ibid : and *R. v. Almon*, 5 Burr. 2689. *R. v. Dodd*, 2724. 2 Esp. C. 33. Dig. L. L. 27. And *Wood's Ins.* 443, 2 Sess. C. 33. 12 Vin. Ab. 229. *Plunkett v. Corbett*, 5 Esp. C. 186. *Haw. P. C. c. 73*, s. 10. *Barnard K. B.* 208.

(*h*) *R. v. Dodd*, 2 Sess. C. 33. Dig. L. L. 27 ; supra note (*f*) for the law presumes that the master is acquainted with what his servant does in the course of his business. And see *R. v. Nutt*, *Barnard K. B.* 308. *Fitzg.* 47. Dig. L. L. 27.

(*i*) See the observations of *Aston, J.* in *R. v. Almon*, 5 Burr. 2686. Supra note (*f*).

(*k*) As when a printer is confined in prison to which his servants have no access, and they publish a libel without his privity. *Woodfall's case*. *Leach's ed.* of *Haw. b. 1, c. 73*, s. 10, note (3).

[1] In Massachusetts it hath been held in *Smith v. Ashley*, 11 Metcalf 367, that the publisher of a newspaper containing a libellous article, is not liable to an action, if at the time of the publication he has no knowledge that the article is libellous. With all respect it is conceived that this decision may be questioned as it is not warranted by the authorities cited in the case. How can the defendant's want of knowledge of the libellous character of the article be shown? In the very nature of things the defence is not susceptible of proof (*Van Ness v. Hamilton*, 19 Johns. R. 372.) Besides if the article was so artfully concocted, that a man of ordinary intelligence, might be mislead by it so as to deem it a mere fancy-sketch, as it seems was pretended in this case, all that can be asked in such a case is that the jury may be instructed to take the circumstance into consideration in mitigation of damages ; but surely it constitutes no defence. See ante Vol. I. p. 212, *et seq.* and p. 221, n. (*z*).

[*a a*] In the case of *Rex v. Gutch* and another, 1 Moody and Malkin 433, on an information against proprietors of a newspaper for publishing a libel, Lord TENTERDEN, C. J. in summing up said, " On the part of Mr. Gutch, it is contended that the proprietor of a newspaper who is not shown to take, or who can show that he took no part in the publication of the newspaper, and of the libel in question, is not criminally responsible. Now, whether it is so shown in this case

Where in an action for a libel it appeared that the libel was written in the hand of the daughter of the defendant (a minor), who usually wrote his letters of business, but no evidence was given of any authority to write the letter in question, or of any recognition of the letter by him, it was held that there was no evidence to go to the jury of a publication by the defendant, since this was not an act within the scope of the defendant's authority (*l*).

If one procure another to publish a libel, the procurer is guilty of a publication, wherever it takes place, and the actual publisher, like any other *particeps criminis*, is competent to prove his employment by the defendant, and the consequent *publication [*35] (*n*). And if a letter be sent by the post it is a publication by the defendant in any county to which the letter is in consequence sent (*o*).

Where the defendant has admitted that he is the author of a particular book, errors excepted, it is incumbent upon him to prove that the errors so excepted are material (*p*).

In the case of libel, as well as in all others, whether civil or criminal, presumptive evidence must be resorted to in failure of di-

is a fact for you to consider : but I am bound to state the law as I have received it from my predecessors. I cannot propose to you a different rule from what I find adopted by those who have filled my situation before me. Now, it is conceded that it has been held in several cases that a proprietor so situated is criminally answerable. But it is said that this is a different principle from that which prevails in all other criminal cases : but this does not appear to me to be so : the rule seems to me to be conformable to principle and to common sense ; surely a person who derives profit from, and who furnishes means for carrying on the concern, and entrusts the conduct of the publication to one whom he selects, and in whom he confides, may be said to cause to be published what actually appears, and ought to be answerable, although you cannot show that he was individually concerned in the particular publication. It would be exceedingly dangerous to hold otherwise : for then an irresponsible person might be put forward, and the person really producing the publication, and without whom it could not be published, might remain behind and escape altogether.

(*l*) *Harding v. Greening*, 1 Moore 477.

(*n*) *R. v. Johnson*, 7 East. 65. *R. v. Dodd*, 2 Sess. C. 33. *Bac. Ab. tit. Libel*, 497. *Wood's Ins.* 445.

(*o*) *R. v. Watson*, 1 Camp. 215, *infra* p. 36.

(*p*) *R. v. Hall*, Str. 416.

rect and positive testimony : and the same reasonable inferences and presumptions are to be made by the juries as in all other instances.

In criminal cases it is always, and in civil cases it is in some instances, necessary to prove a publication within the particular county. It seems that whenever the publication of a libel has once been authorized by the defendant, he is guilty of a publication in whatever county the libel shall afterwards be in consequence published (q).

(q) B. N. P. 6. R. v. Johnson, 7 East. 65. If A. send a libel to London to be printed and published, it is his act in London, if the publication be there. R. v. Middleton, Str. 77. In the case of the King v. The Honorable Robert Johnson, 7 East. 65. the defendant was indicted in the county of Middlesex for having published a libel in Cobbett's Weekly Register. Mr. Cobbett, the publisher of the Register, proved that he had received an anonymous letter (the original of which he believed to be destroyed,) in the same hand-writing as the libels which he afterwards received; in which letter (parol evidence of which was admitted to be given for this purpose,) the writer inquired whether it would be agreeable to Mr. Cobbett to receive for publication, in his Register, certain information of public affairs in Ireland, and if it were, he was desired to say to whom such information was to be directed. In consequence of the receipt of this letter, which was published in the Register, Mr. Cobbett, through the medium of the same Register, requested the promised information to be directed to Mr. Budd, No. 100, Pall Mall, whose shop was at that time used by Mr. Cobbett for the publication of his Register, where letters of communication were addressed to him, and from whence he received them, his own house being in Duke-street, Westminster. After this intimation, Mr. Cobbett received, in due time, two several letters, containing different parts of the libels in question, both in the same hand-writing with the letter previously received. Both the letters came under cover, but the covers were believed either to be destroyed or lost, having been thrown aside as useless; and therefore parol evidence was admitted, to prove that they had the Irish post-mark upon them, and were directed in the manner pointed out in the Register. The first of the letters, dated 20th October, 1803, was received, and the cover opened by Mr. Budd, who thereupon sent it, together with the cover opened, to Mr. Cobbett in Duke-street, by a person in the office whom the witness did not recollect. But in consequence of his desiring Mr. Budd not to open any other letters so directed, Mr. Cobbett received the next letter, which came to Mr. Budd by a subsequent post, unopened. Several witnesses were then called, who, upon examination of the letters so received by Mr. Cobbett, swore to their belief of their being the hand-writing of the defendant, who at the period in question, was an Irish judge. It was then proposed, by the attorney-general, that the letters containing the libels should be read, which he said contained internal evidence that they were written

- [*36] Where the writer of a libel sent it *by the post, directed to A. B. in the county B. and it was in consequence sent
- [*37] into the county *B. and from thence sent by the post to A. B. in the county M. where A. B. received it and read
- [*38] *it, it was held to be a publication in the county M. (r).

If the libel be dated of a particular place, the date is evidence that it was written there (s). It has been said, that the post-mark upon a letter is not *prima facie* evidence to prove that a letter has been put into the post-office at the place denoted by the post

and sent by the writer to Mr. Cobbett, for the purpose of being published in his Register.

But the reading was objected to, upon the ground that there was no evidence to go the jury, of a publication *by the defendant* in Middlesex. That, admitting the libels to be in the hand-writing of the defendant, there was no evidence to show that he had sent them into Middlesex to be there published, nor any privy established between himself and Cobbett. The case of the *Seven Bishops* was quoted as in point; and it was contended, that if any publication, proved to have taken place in Middlesex, was sufficient ground for the reading of the libel there, it ought to have been read in that case, since the petition, which had been acknowledged to have been signed by them, was found in the king's hands in Middlesex; and that the only link there wanting was, that it came there by the agency of the Bishops, which was holden not to be supplied by the evidence of their acknowledgment of their hand-writing in that county. The trial was at bar, before Lord Ellenborough, C. J. and Grose, Lawrence, and Le Blanc, Justices

But it was answered by the court, that the case of the *Seven Bishops* was irrelevant; that it had been soundly ruled in their case, that the confession of their signatures, extorted from them as it was, did not amount to evidence of a publication in Middlesex; that, in the present case, a publication in Middlesex had been proved by Mr. Cobbett, and that the notification by letter to him, that he should receive certain papers for the purpose of publication, the public answer in the Register appointing the mode of sending, and the consequent receipt of papers by Cobbett, through that channel, answering the description of those proposed to be sent, and proved to have been written by the defendant, afforded evidence to go to a jury to decide, whether the publication in Middlesex had not been made through the defendant's procurement. The jury found the defendant guilty.

(r) *R. v. Waston*, 1 Camp. 215; and see *R. v. Girdwood*, East's P. C. 1116 1120.

(s) *R. v. Burdett*, 4 B. & A. 95.

mark (*t*); it seems, however, from a later authority, that the post-mark is a fact *admissible in evidence, when corroborated by other circumstances (*u*). [*39]

A general confession that the defendant was the *writer* of a libel, does not amount to an admission that he *published* it, still less is it a confession that he published it in any particular county (*x*).

A late case upon this subject excited much interest, and occasioned much legal investigation and discussion. The points were shortly as follow. The information charged the defendant with composing, writing, and publishing a libel in Leicestershire; A. stated that he received the libel, which was in the hand-writing of the defendant, from *B. on the 24th of August (*y*), it was contained in an envelop, which had been destroyed, but which, to the best of the witness's recollection was addressed to B. who was the professional friend of the defendant; there was no trace of any seal, either on the envelop or paper. The paper was dated Kirby Park, August the 22d. Kirby Park (the defendant's seat) being situate in Leicestershire, 100 miles from London, not far from the boundary between the counties of Leicester and Rutland. The defendant was seen in the county of Leices-

(*t*) *R. v. Waston*, 1 Camp. 215. But the defendant was found guilty of another publication.

(*u*) *R. v. Johnson*, 7 East. 65; note, that in this case the post-mark seems to have been perfectly immaterial; but, upon principle, there seems to be little doubt, that a post-mark upon a letter, in the hand-writing of a defendant, and received through the medium of the post, is evidence, as a circumstance arising in the usual course and routine of business. See *Fletcher v. Braddyll*, 3 Starkie's C. 64.

(*x*) The *Seven Bishops'* case, 4 St. Tr. 304; 4 Jac. II, where the defendants, in Middlesex, admitted their signatures to a petition which had been prepared and signed in Surrey; but it was held that this was not evidence of a publication of that which was termed (but grossly misnamed) a libel in the county of Middlesex. And see the observations upon this case by Ld. Ellenborough, C. J. and Lawrence, J. in *R. v. Johnson*, 7 East. 65; and *R. v. Burdett*, 4 B. & A.

(*y*) A. did not state where he received it, but it was assumed, and no doubt it was the fact, that he received it in Middlesex.

ter, near Kirby Park, on the 22d and on the 23d of August, and there was no evidence of his having left the county of Leicester till after the publication (z) of the paper, which took place on the 25th; the only words, either on the paper or envelop, besides the libel, were "forward this to A." (the witness). The paper was addressed to the electors of Westminster; and A. had no reason for supposing that the defendant intended that it should be published, except that it was so addressed. A. having been required to give up the author, the defendant wrote a letter admitting that he [*41] was the author. *No evidence was given on the part of the defendant. It was objected at the trial, and afterwards in the Court of King's Bench, after the conviction of the defendant, on a motion for a new trial, that there was no evidence of a *publication in Leicestershire*. The learned judge left it to the jury to say, whether there had been a publication in Leicestershire, by an open delivery of the libel. The question and the principles relating to it, were discussed, on the motion for a new trial, with all the aid which talent, learning, experience, and unwearied diligence could supply. The ultimate, although it seems not the unanimous, decision of the court was, that the evidence was sufficient to warrant the conviction (a).

(z) *i. e.* in the public newspapers.

(a) *R. v. Sir Francis Burdett*, Bart. 4 B. & A. 717. The judges delivered their opinions *seriatim*. Best, J. was of opinion that there was presumptive evidence of an actual publication in Leicestershire, and that the sending the libel by the post, from that county, amounted to a publication. *R. v. Watson*, 1 Camp. 215. *R. v. Williams*, 2 Camp. 505. *Codex Lib.* 9. tit. 36; and see *Girdwood's case*, East's P. C. 1116, 1120.

Holroyd, J. was of opinion, that the composing and writing a libel in the county of L. and afterwards publishing it, although the publication was not within the county of L., was an offence sufficiently charged as a substantive offence in the information, and which gave jurisdiction to a jury of the county of L. (see *R. v. Beere*, 2 Salk. 417. Carth. 409. Holt's R. 422. *R. v. Knell*, Barnard, K. B. 305. *R. v. Carter*, 9 St. Tr.) and that the composing and writing, with the intent afterwards to publish, also amounted to a misdemeanor; and that a jury of the county of L. might inquire as to the publishing in another county, in order to prove the defendant's intention in composing and writing in the county of L. And that, in the case of an aggregate charge, part of

*Some proofs are to be noticed which apply particularly to the proprietors and publishers of newspapers. [*42]

Upon an indictment for a libel, *published in a newspaper called the World, proof that the paper was sold at the defendant's office, and that he *as proprietor*, had given a bond to the stamp office, as required by the stat. 29 Geo. III. c. 10, s. 10, for securing the duties on advertisements, and that he had from time to time applied to the stamp-office respecting the duties, was held to be strong evidence to prove a publication by him (*b*). [*43]

Hart and *White* the printer and proprietor of a newspaper called "The Independent Whig (*c*)," were indicted in London, for a libel published in that paper.

The prosecutor gave in evidence the affidavits sworn by the defendants, according to the stat. 38 G. III. c. 78 (*d*),

which, being in itself a substantive misdemeanor, is committed within a particular county, the jury may inquire into the remainder, although done elsewhere ; that there was reasonable evidence of a publication in L. ; and that a *delivery* of a libel within the county, although it be sealed, is a publication in law.

Bayley, J. was of opinion that there was not sufficient evidence to support a presumption that there had been an open delivery of the libel in L., considering that positive proof might have been given by calling B. as a witness. He gave no opinion on the question, whether a close delivery amounted to a publication. He held, that the whole *corpus delicti* must be proved within one county ; and that there was no distinction in this respect between felonies and misdemeanors. He gave no opinion on the question, whether the composing a writing, with intent to publish, constituted an offence.

Abbott, L. C. J. intimated his opinion, that mere *delivery* constituted a publication. He held that the facts warranted the conclusion that the paper had been delivered by the defendant in L., to B., in the state in which it had been delivered by the latter to A. That, even supposing the libel to have been delivered by the defendant in a different county, yet as the whole was a misdemeanor, compounded of distinct parts, each of which was an act done in the prosecution of the same criminal intention, the whole might be tried in the county of L. where one of those acts had been done.

(*b*) R. v. Topham, 4 T. R. 126.

(*c*) 10 East. 94.

(*d*) By sect. 1, no person shall print or publish any newspaper until certain affidavits, or affirmations, &c. shall have been delivered to the commissioners, of stamps, &c.

By sect. 2, these must contain a true description of the printers, publishers, and proprietors, or of two of them, and of their places of abode ; of the propri-

- [*44] with their hands-writing *thereto and delivered to the commissioners, containing all the particulars required by the
- [*45] act, *and, amongst the rest, the description of the place

etors' share in the paper, and the house in which it is intended to be printed, and of its title.

By sect. 9, all such affidavits and affirmations, or copies thereof, certified to be true copies according to the act, shall, in all proceedings, civil and criminal, touching any newspaper, or other such paper as aforesaid, which shall be mentioned in any such affidavits or affirmations, or touching any publication, matter, or thing contained in any such newspaper or other paper, be received and admitted as conclusive evidence of the truth of all such matters set forth in such affidavits or affirmations, as are hereby required to be therein set forth, against every person who shall have signed, sworn, or affirmed such affidavits or affirmations ; and shall also be received and admitted, in like manner, as sufficient evidence of the truth of all such matters, against all and every person who shall not have signed or sworn, or affirmed the same, but who shall be therein mentioned to be a proprietor, printer, or publisher of such newspaper, or other paper, unless the contrary shall be satisfactorily proved. The section then contains an exception in favour of such as have, before the publication of the paper in question, delivered in to the commissioner an affidavit, &c., stating that they have ceased to be the printers, &c. of such paper.

By the 10th section, in some part of every newspaper, &c. shall be printed the names, additions, and places of abode of the printers and publishers, and of the place where the same is printed.

By sect. 11, it shall not be necessary, after any such affidavit, &c. or a certified copy thereof, shall have been produced in evidence as aforesaid, against the persons who signed and made such affidavit, or are therein named, according to this act, or any of them, and after a newspaper, or other such paper as aforesaid, shall be produced in evidence, intituled in the same manner as the newspaper, or other paper mentioned in such affidavit or copy is intituled, and wherein the name or names of the printer and publisher, or printers and publishers, and the place of printing, mentioned in such affidavit or affirmation, for the plaintiff, informant, or prosecutor, or person seeking to recover any of the penalties given by this act, to prove that the newspaper or paper to which such trial relates, was purchased at any house, shop, or office belonging to or occupied by the defendant or defendants, or any of them, or by his or their servants or workmen, or where he or they, by themselves, or their servants or workmen, usually carry on the business of printing or publishing such paper, or where the same is usually sold.

By sect. 13, it is enacted, that a certified copy of such affidavit or affirmation shall be delivered by the commissioners to the person requiring it, upon payment of one shilling.

where the newspaper was printed, which *was in London. [*46]
 An officer from the Stamp-Office, (which is not in London) produced a newspaper, without stating from whence it came, containing the libel in question, which newspaper answered the whole description contained in the affidavit, and stated, at the foot of it, that it was printed at No. 33, Warwick-lane, London ; and 'it was also proved that the defendant's printing-house [*47] was at the same place.

The defendants were found guilty, but a new trial was afterwards moved for, on the ground that the evidence at the trial was insufficient to prove a publication in London ; that the 9th clause of the act cited made the affidavit evidence of nothing more than the matters contained therein, which, by reference to the second clause, are

By sect. 14, in order to prevent the inconvenience which might result from requiring the personal attendance of the commissioners, it is enacted, that a certificated copy of any affidavit or affirmation, proved to be signed by the person who has the custody of the original, shall, without proof that he is a commissioner or officer, be received in evidence as sufficient proof of such affidavit or affirmation, and that the same was duly sworn or affirmed, and of the contents thereof ; and that such copies, so produced, and certified, shall also be received as evidence that the affidavit or affirmation of which they purport to be copies have been sworn or affirmed according to this act ; and shall have the same effect in evidence as the originals would have had in case they had been produced and proved to have been duly so certified, sworn, and affirmed, by the person appearing by such copy to have sworn or affirmed the same as aforesaid.

By the 17th section, it is enacted, that every printer or publisher of any newspaper, or other such paper, shall within six days, deliver to the commissioners, or their officer, one of the papers so published, signed by the printer or publisher in his hand-writing, with his name and place of abode ; and that the same shall be kept by the commissioners or their officer, under a penalty, in case of neglect by such printer or publisher, of £100 ; and that upon application by any person to the commissioners or their officer, to have such paper produced in evidence in any proceeding, whether civil or criminal, such commissioners or officer shall, at the expense of the applicant, at any time within two years from the publication, either cause the same to be produced in the court, and at the time when the same is required to be produced, or shall deliver the same to the applicant, on his giving reasonable security at his own expense, for returning the same ; and that in case such commissioner or their officer cannot, by reason of a previous application, comply with the terms of a subsequent one, they shall comply with such subsequent one as soon afterwards as they shall be able so to do.

the names, additions, descriptions, and places of abode of the printers publishers, and proprietors, the description of the printing-house and title of the paper ; that it was still necessary to prove a publication in the county where the trial was had, since the paper, though printed in one place may be published in another ; that the 11th section is confined to actions or informations for penalties given by the act ; that the object of the 17th clause was to fix the printing and publication upon the parties described in the stamp-office documents, by comparing the newspaper so delivered with any other of the same impression published in the county where the trial is had ; but that a publication to the commissioners, under the direction of the act, could not be considered as a libellous and guilty publication, without any other evidence of publication in the same place ; that, besides, the newspaper was only produced by an

[*48] *officer from the stamp-office, without any proof how it came there, or from whom it was received.

The court were satisfied that the evidence of a publication in London was sufficient (*e*), on the ground that “the act requiring an affidavit to be made by the printers, proprietors, and publishers, specifying their names and places of abode,” &c. makes the affidavit conclusive as to the several facts contained in it, as against the persons signing it, unless they ceased to be printers before the publication complained of. That had the act stopped here, the affidavits would be conclusive that one of the defendants was the printer and publisher, and the other the proprietor of the paper so intituled ; and that it was printed at the place therein described, which is within the city of London, that would have put them upon shewing that the paper produced was a fabrication. But the 11th section goes further, and enacts, that proof of the affidavit shall render it unnecessary to prove that a newspaper, corresponding in title, &c. with the one described in the affidavit, and to which the trial relates, was purchased at any house, &c. belonging to or occupied by the defendants, their servants, &c. or where they usually carry

[*49] on the business of printing or publishing *such paper, or where the same is usually sold.

(*e*) Lord Ellenborough, C. J. gave no opinion.

That, at all events, the 11th section superseded the necessity of further proof, since the words of it, plaintiff, informer, prosecutor, &c. were general, and not confined to informants seeking to recover penalties.

Where the defendant, having exhibited a libellous paper, retains it in his possession, if, after notice to produce it, he refuse, parol evidence may be given of its contents, and that even in cases of treason (*f*); and a printer may prove that he received a libel in manuscript from the defendant, and returned it to him (*g*).

To prove (*h*) the publication of a newspaper, an unstamped copy may be given in evidence, and the witness may swear, that similar papers were published.

A delivery of a newspaper, according to the provisions of the stat. 38 G. III. c. 78, to the officer of a stamp-office, is a sufficient publication, though it is directed by the statute, for the officer has an opportunity of reading it (*i*).

Where the libel has been published in a foreign *lan- [*50] guage, it must be shown, by means of a sworn interpreter, that the translation set out in the declaration is a correct one (*k*). Where an indictment charges the defendant with composing, printing, and publishing a libel, he may be found guilty of the printing and publishing, or of the publishing only (*l*).

Where a governor of a British colony has made communications to the attorney-general of the colony as such, the latter is not bound to reveal them in an action against the former (*n*). So it has been held to be optional, on the part of a barrister, whether he will disclose what passed in court upon his making a motion for a criminal information (*o*). According to the general rule of law, that a witness is not bound to criminate himself, no witness is bound to answer

(*f*) See *Le Merchant's case*, 2 T. R. 201. *Layser's case* 6 St. T. 229.

(*g*) *R. v. Pearce*, Peake's Cas. 75.

(*h*) *Ibid.*

(*i*) *R. v. Amphlitt*, 4 B. & C. 35.

(*k*) *Supra* vol. I. p. 368.

(*l*) *R. v. Williams*, 2 Camp. 506. *R. v. Hunt*, *ib.* 583. 2 East's P. C. 515. 6.

(*n*) *Wyatt v. Gore*, Holt's C. 299.

(*o*) *Per Eyre*, C. J. 1 Esp. C. 456.

a question, where the answer may tend to shew that he has been guilty of publishing a libel, for which he may be indicted (*p*).

Next, as to proof of the colloquium or innuendos.—Having proved the act of speaking the words, or publishing the libel,
 [*51] the next step is to *prove their application to the plaintiff, and to the extrinsic matters whose existence is alleged in the introductory part of the declaration or indictment, where the illegality of the words or libel depends upon their application to such extrinsic facts. This is usually done by the testimony of one or more witnesses who know the parties and circumstances, and who can state their judgment and opinion on the application and meaning of the terms used by the defendant, as alleged in the declaration or indictment. As such evidence is simply as to a result or conclusion which the witness may have derived from a great variety of circumstances, it is sufficient if, in the first instance, he state his belief and opinion as to the defendant's meaning generally, if he think proper, to inquire as to the means and grounds which the witness had for forming that conclusion.

The meaning of the defendant, as averred by an innuendo, is a question of fact, to be decided by the jury (*q*).

Where the words are spoken in a foreign language, or where the terms are ambiguous, and it is doubtful in what sense the
 [*52] speaker intended *them, the question is, in what sense the hearers understood them; and if, where words may have two meanings, the hearers understood them in an actionable sense, the action is maintainable; for the slander and damage consists in the apprehension of the hearers (*r*). Where slander is published in a foreign language, it is necessary to shew that the hearers understood the language, for it will not be presumed that being ignorant of the words, they afterwards repeated them to those who

(*p*) *Moloney v. Bartley*, 3 Camp. C. 210; *supra* vol. 1. p. 251; and see *Starkie on Evidence*, pt. iv. 1740.

(*q*) Per Lord Ellenborough, C. J. in *Roberts v. Cambden*, 9 East. 96, Sir W. Blackstone. 2 W. Bl. 962, and Gould, J. in *Oldham v. Peake*, 2 W. Bl. 959, Cowp. 278, and see *Penfold v. Westcote*, 2 N. R. 335.

(*r*) *Fleetwood v. Curley*, Hob. 267; for where slanderous words are spoken, which are wrong, the doers are answerable for all evil intents and damages. *Ib.*

understood them (*s*). But it seems that where the words are actionable in respect of extrinsic facts, as for instance, that they were spoken of the plaintiff in his character of an attorney, it is not essential to shew that the hearers knew the fact at the time of the speaking, for they may know it afterwards, and communicate the words to those who know it (*t*).

Next as to the evidence of malice and intention.—It has been already observed, that where words have been uttered, or a libel has been published of the plaintiff, by which actual or presumptive damage has been occasioned, the malice of the defendant *is a mere inference of law from the very act, for [*53] the defendant must be presumed to have intended that which is the natural consequence of his act (*u*). In such instances, therefore, it is unnecessary to give evidence of malice in fact or actual malice, unless it may be by the way of aggravating the damages. In other cases, the occasion and circumstances of the speaking and publishing repel the action, either peremptorily and absolutely, *or* unless express malice exist; and in this latter class of cases, where *actual malice* is essential to the action, it lies on the plaintiff to prove the fact. Where the burthen of proving express malice is thus thrown upon the plaintiff, he may give in evidence any expressions of the defendant, whether they be oral or written, which indicate spite and ill will, for the purpose of shewing the temper and disposition with which he made the publication complained of.

It has, however, been held, that other words or libels are not admissible evidence to show the *quo animo*, unless they relate to the same subject. An action was brought for a libel published in a periodical work, called the *Satirist*, or *Monthly Meteor*, which stated (*inter alia*) that the plaintiff, being prosecuted by the attorney-general, *had fled the country, that he [*54] might save himself from the pillory. To prove the ma-

(*s*) P. C. Hob. 268; and see 1 Vin. Ab. 507, and Gilb. Cas. L. & E. 117.

(*t*) P. C. Fleetwood v. Curley, Hob. 267.

(*u*) Prosser v. Bromage 4 B. & C. 247. supra vol. I. 220, R. v. Harvey, 2 B. & C. 258. supra vol. I. p. 215.

licious motive of the defendant, the plaintiff's counsel proposed to read extracts from a subsequent number of the *Satirist*, but Sir J. Mansfield, C. J. rejected them all, except one, which had immediate reference to the former libel (x).

But it is to be remarked that, in this case, there was no doubt as to the animus; the publication was clearly libellous in itself, and the occasion of publishing did not render proof of malice in fact necessary. As nothing turned upon the defendant's real intention, the evidence was inadmissible; for it is perfectly clear that subsequent libels cannot be received in evidence, with a view to enhance the damages, for they are substantive and independent causes of action. And in the subsequent case of *Stuart v. Lovell* (y), where the publication declared on was clearly libellous, Lord Ellenborough, C. J. rejected evidence offered of the publication of subsequent libels, observing that such evidence would certainly be admissible to shew the intention of the defendant, were it all

equivocal, but that they were not admissible for the [*55] *purpose of enhancing the damages [1]. A case, therefore, of equivocal intention, as where the question depends on the existence of malice in fact, differs widely in this respect from one which admits of no doubt on the subject; where such a doubt exists, and where the material question in the cause is, whether the defendant was justified by the occasion, or acted from express malice, it seems, in principle, that any circumstances are admissible which can elucidate the transaction and enable the jury correctly to conclude whether the defendant acted fairly and honestly according to the occasion, or *malà fide* and vindictively, for the purpose of causing evil consequences.

In an action for a malicious prosecution of an indictment for per-

(x) *Finnerty v. Tipper*, 2 Camp. C. 72. His Lordship said you might as well give in evidence one highway robbery on the trial of another.

(y) 2 Starkie's C. 93.

[1] In *Thomas v. Croswell*, 7 Johns. R. 271, SPENCER, J. intimated his opinion that subsequent publications were not admissible in evidence, even to show the *quo animo*; though he deemed it unnecessary to the right adjudication of that case to settle the rule of law upon the subject.

jury, evidence was admitted of an advertisement published by the defendant pending the prosecution, although an information had been granted for publishing that advertisement (z).

In an action for words imputing perjury, the plaintiff was allowed to prove that, subsequently to the speaking of the words, the defendant had preferred an indictment against him (a). But in such cases the jury are not to consider the effect *of such evidence in measuring the amount of the damages, but [*56] merely as a circumstance to prove malice (b).

It was once doubted whether, in admitting evidence of this nature, a distinction ought not to be made between words not actionable in themselves and those which are so. In the case of *Mead v. Daubigny* (c), Lord Kenyon rejected evidence of words actionable in themselves, and not mentioned in the declaration; but his lordship afterwards changed his opinion, and admitted such evidence in a subsequent case (d).

In *Russel v. Macquister* (e), evidence of actionable words spoken after the time of those laid in the declaration, was objected to, on the ground that if such words were taken into consideration, by the jury, the defendant might be made to pay a double compensation for the same *injury, since another action might be brought for the words last spoken, and the distinction was [*57] taken between that case and the case of words not actionable. But Lord Ellenborough, C. J. overruled the objection, observing, that though such a distinction had once prevailed, it was not founded in principle; and that, although no evidence can be given

(z) *Chambers v. Robinson*, Str. 691.

(a) *Tate v. Humphreys*, 2 Camp. 73, n. Cor. Graham, B. and afterwards by the court.

(b) 2 Camp. C. 73.

(c) *Peake's C.* 125.

(d) *Lee v. Huson*, *Peake's C.* 166. *R. v. Pearce*, ib. 75. In the case of *Warne v. Chadwell*, 2 Starkie's C. 457, the words (spoken of a tradesman) were, "He is a bankrupt and cannot pay five shillings in the pound; he is not fit to be trusted;" and the plaintiff was allowed to prove that on another occasion the defendant had said that the plaintiff had called his creditors together and had offered them a composition of five shillings in the pound.

(e) 1 Camp. 49.

of any special damage not laid in the declaration, yet that any words, or any act of the defendant, is admissible, to shew *quo animo* he spoke the words which are the subject of the action [1].

Upon the same principle (*f*), where a libel was contained in a political paper published weekly by the defendant, after proof that the paper in question had been purchased at the defendant's office, evidence was admitted of the previous sale of other papers with the same title at the same office; and the reason of admitting it was, to shew that the papers, which purported to be weekly publications of public transactions, were sold deliberately, and vended in the regular course of circulation; that the paper containing the libel was not published by mistake, but vended publicly, deliberately, and in regular transmission for public perusal.

[*58] In an action where any words, or other libels, *not specified in the declaration, are offered in evidence, the defendant is at liberty to prove the truth of the charges or imputations which they contain, for he had no opportunity of pleading the truth in justification (*g*).

It has already been seen that, to support an action by a servant against a former master, for slander in giving his character, the plaintiff must prove that the character was both falsely and maliciously given (*h*) [2].

(*f*) *Plunkett v. Cobbett*, 5 Esp. C. 136.

(*g*) See *Stuart v. Lovell*, 2 Starkie's C. 93. *Warne v. Chadwell*, 2 Starkie's C. 457.

(*h*) *Supra v. I.* p. 294.

[1] Similar proof was received in *Shock v. McChesney*, 2 Yeates 473, and in *Wallis v. Mease*, 3 Binney 546. So also evidence of the repetition of the *same words* after suit brought was received in *Kean v. McLaughlin*, Serg. & Rawle 469.

[2] From the decisions made on the subject of privileged communications, since the publication of the Second English edition of this work, the following cases have been selected.

It has been supposed that in *Fountain v. Boodle* (3 Queen's Bench R. 5; 2 Gale & D. 455 S. C.) it was decided that *proof of falsehood in a character given of a servant is prima facie evidence of malice*. But it is not so. The case was this: in answer to an inquiry as to the character of a governess, the defendant wrote a letter in which she said "I parted with her on account of her incompetency, and not being lady-like, nor good-tempered." The governess had been

In such instances the plaintiff, if charged with dishonesty and misconduct in the defendant's service, is at liberty to prove his good character and conduct in former services, since general char-

employed by the defendant for upwards of a year, who during that time had twice recommended her to similar situations. The governess brought an action for the writing of the above letter, and gave evidence tending to negative the statements in it. No evidence was given for the defendant. On the trial of the cause the Judge had submitted the question of *malice* to the jury, by directing them that the letter itself, and the facts of the case proved that the writer was actuated by express malice. The plaintiff had a verdict, and on a motion for a new trial Lord Denham C. J. conceded that *mere falsehood* is no disproof of *bona fides*, and that the main question was : whether there was *any evidence of malice*. See also what was said by Lord Mansfield on this subject in *Lowry v. Aikenhead* post p. 300.

Express malice may be collected from slight proof, or even from the face of the libel itself. *Kelly v. Vartington* 2 Nev. & M. 460 : 4 Barn. & Ald. 700 ; *Wright v. Woodgate* 2 C. M. & R. 573 ; 1 Tyr. & G. 12.

"A communication of suspicion of felony is not necessarily restricted to an officer of justice to entitle it to be considered as privileged ; when made to others it is for a jury to say whether the party making it acted in good faith." *Padmore v. Lawrence*, 11 Adol. & Ellis. 380.

"A letter from a son-in-law to his mother-in-law, volunteering advice respecting her contemplated marriage, and containing imputations upon the person with whom she is about to contract matrimony, is a privileged communication and not actionable unless malice be shown. Such communications are viewed liberally by juries." *Todd v. Hawkins*, 8 Carr. & Payne 888 ; 2. M. & Rob. 20.

"Where a party under full belief, warranted by circumstances, that his debtor had committed an act of bankruptcy, gave notice to an auctioneer, not to part with the proceeds of certain goods of the debtor sold by him, it was held by three judges to one that the communication was privileged." *Blackham v. Pugh*, 2 Mann. Gr. & Sc. 611.

A party communicated to a ship-owner a letter representing the master of his ship as a drunkard, neglectful of his duty, and endangering the lives of passengers, and the safety of ship and cargo. This communication was made to the ship-owner in good faith and from a sense of duty, but without any knowledge of the truth of the charges other than that derived from the letter. In consequence of this communication the master was discharged from service, and he brought an action against the party receiving the letter, who undertook to justify but failed to support his plea by proof. Having however also pleaded other pleas he obtained a verdict under the charge of the presiding Judge *that in the absence of malice in fact* the publication of the letter was privileged. The plaintiff obtained a rule *nisi* for a new trial for misdirection. The case was twice argued ; the second time at the request

acter is in some respects in issue; so the plaintiff may prove, by the evidence of other servants in the same family, that, whilst he remained in the defendant's service, he conducted himself well, and that no complaints of the nature ascribed to him by the defendant then existed (*i*). And the tendency and bearing of this evidence is to shew, that the defendant *knew* that the character which he gave was false: the plain reason for this is, that the knowledge of misconduct frequently rests with the defendant himself; [*59] and, being unable to *prove it by the testimony of others, if the general presumption were to operate against him, he would be left without defence. To prevent such inconvenience, the law requires malice to be proved from other sources. In case, however, the plaintiff should be able expressly to prove that the defendant was aware of the falsity, no further proof of malice would be requisite; nor, indeed, could stronger proof of it be adduced than that the defendant had given a character of the plaintiff injurious to his reputation, with a full knowledge that it was untrue.

The circumstances under which the master and servant parted, any expressions of ill will uttered by the former, his officiously acquainting others with the servant's misconduct, without any previous application to him for a character, are all facts which are proper for the consideration of a jury to enable them to form their opinion upon the question of intention.

(*i*) 3 B. & P. 589.

of the court. After the second argument Chief J. TINDAL and ERLE J. held that the publication was a privileged communication; COLTMAN and CRESWELL, Justices, held the contrary, and insisted that the defendant was a volunteer in making the communication; that no relations existed between him and the ship-owner justifying what he had done, he was neither his agent, nor was there any relationship or intimacy existing between them; nor had any inquiry been made as to the truth of the charges. The Judges who held the communication privileged, rested their opinions chiefly upon the ground that it was the *moral duty* of the defendant to make the communication; whilst the other judges argued that he defendant was under no legal or *moral* duty to make the communication; that the moral duty of the defendant not to publish *defamatory charges* which the *did not know to be true*, was quite as strong as the duty to communicate to the ship-owner that *which he believed to be true*. The Court being equally divided, the verdict was permitted to stand, and the question remains *res integra*. Coxhead v. Richards, 10 Jurist p. 984, anno 1846.

The plaintiff cannot in ordinary cases, where no justification is pleaded, adduce evidence of the falsity of the charge, either to shew malice or to enhance the damage (*k*); for, unless the defendant shew that he was justified by the occasion, malice will be inferred, and therefore need not be proved; and in the absence of express allegations and proof of the plaintiff's guilt, his innocence *will be presumed (*l*). It has even been said, that al- [*60] though the defendant had pleaded a justification, charging the plaintiff with having stolen money from the defendant, the plaintiff could not give general evidence of good character (*m*).

(*k*) *Stuart v. Lovell*, 2 Starkie's C. 93.

(*l*) But as the defendant's knowledge that the charge was untrue, where he sought to protect himself under colour of the occasion of speaking or writing, would be conclusive evidence to overturn the defence, it would, as it seems, be admissible for that purpose.

(*m*) *Cornwall v. Richardson*, 1 R. & M. 305. Cor. Abbott, L. C. J. It appears, however, from the report of this case that his lordship interposed rather in favor of the plaintiff, in cautioning his counsel that, if such evidence were received it would afford the defendant an opportunity of giving general evidence to the contrary, than that he expressly ruled the point. The plaintiff, it seems, where a justification is pleaded, is at liberty to go into the whole of his case, and therefore may, it should seem, in principle, adduce any evidence which tends to prove it; but, as he is not allowed to prove a particular issue by piecemeal, it is probable that, if he gave evidence of good character, in anticipation of the defendant's case, in justification, he would not be allowed afterwards to go into a general case, by way of reply to the defendant's evidence. See *Pierrepont v. Shapland*, 1 Car. & P. 448; and therefore, where there is reason to apprehend that the defendant intends to rely on such a justification in evidence, and the plaintiff has proof in answer, it would be impolitic and dangerous to adduce any part of it by way of anticipation. In the case of *King v. Waring and ux.* 5 Esp. C. 13, evidence of the plaintiff's previous good character, as a servant, was admitted; but there the action was brought against a former mistress, and the alleged libel was written in a letter, in which the defendant, professing to give the plaintiff's character, charged her with dishonesty and misconduct; and, in such a case, the falsity of the imputation and express malice are essential to the action. The general rule seems to be, that evidence of good character is not receivable until it has been impeached. See Starkie on Evidence, pt. iv. 367, 869, 917, 1310. But whilst the plea of justification stands on the record, the plaintiff's character is, as it seems, in question.

*Where the inference of malice and ill-will, arising [*61] from the very nature of the words or libel, is not repelled by the occasion and circumstances of the speaking or publishing, no evidence of malice is of course expected from the plaintiff; and any overt act of publication imposes the burthen of explanation upon the defendant, since it will be presumed that the party knew the contents of that which he published. Thus it has been seen, that a bookseller is, in the first instance presumed to know the contents of any book sold at his shop, and on proof of the sale, the contents are so far considered to have been fixed upon him, that the plaintiff is entitled to have them read in evidence. So far has this species of presumption been carried, that it has been held that, upon an indictment for sending a threatening letter, the bare delivery of it, though sealed, was *prima facie* evidence of a guilty knowledge of its contents (*n*):

[*62] *Where the special damage is essential to the action the plaintiff must prove it according to the allegations in his declaration (*o*). It must be shewn that the damage alleged and proposed to be proved, was the natural and immediate consequence of the slander. The general rule is, that no evidence of special damage is admissible, unless it be averred in the declaration, whether special damage be the gist of the action, or be used as matter of aggravation, the words being in themselves actionable (*p*). But it has been said, that greater certainty is requisite, where the special damage is the gist of the action, than where it is merely laid by way of aggravation (*q*).

Where the damage consists in loss of marriage, the plaintiff cannot, without specifying the individual with whom the marriage would otherwise have been contracted, give evidence of the loss (*r*). So

(*n*) *R. v. Girdwood, Leach, C. C. L. 169.*

(*o*) *Supra* v. I. p. 439.

(*p*) *B. N. P. 7. 1 Will. Saund. 243. n. 5.* It was formerly held, that where special damage was the gist of the action, such special damage might be given in evidence, although the particular instances were not specified, otherwise where the words were actionable. *Str. 666.*

(*q*) *Per Cur. in Whetherell v. Clerkson, 12 Mod. 597. 2 Lutw. 1295. See Clarke v. Periam, 2 Atk. 33. Supra vol. I. p. 239.*

(*r*) *Barnes v. Prudling, 1 Sid. 396. 2 Vent. 4. Hunt v. Jones, Cro. J. 499. 12 Mod. 597.*

if he allege loss of marriage with M. N., he cannot give *in evidence loss of marriage with any other person (s). [*63]

In an action for slander, by which the plaintiff has lost his customers, he cannot give in evidence the loss of any whose names are not specified in the declaration (t). But where it is alleged, as special damage, that the plaintiff was prevented from selling his estate, and that the bidding was prevented by the act of the defendant, the fact may be proved, although the names of particular bidders are not specified; for the loss is the preventing of the sale (u), and proof that persons would have purchased is evidence of such prevention.

Where the plaintiff alleged that he had been employed, from time to time, to preach to a congregation of dissenters, and that, by reason of the words the persons frequenting the chapel had wholly refused to permit him to preach there, and had discontinued to give him the gains and profits which they otherwise would have given, the court, after a verdict for the plaintiff, on motion in arrest of judgment, held that the allegation of damage was sufficient; for he could not have *stated the names of all his [*64] congregation (x). In such a case, therefore, it should seem that general evidence of the loss of emolument would be admissible.

Where the special damage was alleged to be the loss of the profits of several performances at a place of public amusement, it was held that the witnesses might be examined generally as to the diminution in the receipts, but that they could not be asked whether particular persons had not given up their boxes (y) [a a].

(s) Lord Raym. 1007.

(t) 8 T. R. 130.

(u) See *Snead v. Badley*, Cro. J. 397. Sir W. Jones, 196.

(x) *Hartley v. Herring*, 8 T. R. 130.

(y) *Ashley v. Harrison*, 1 Esp. C. 48.

[a a] The declaration alleged that certain persons, (*naming them*), who would otherwise have employed the plaintiff, refused so to do; the proof was, that by reason of the speaking of the words, the persons named would have recommended him to others, which others, had he been so recommended, would have employed him; held that the declaration was not supported by the evidence, for the non-performance arose from the non-recommendation. *Strong v. Forman*, 2 C. and P. 592.

The plaintiff must also prove that the damage was the consequence of the defendant's act.

The connection between the wrong done by the defendant and the loss to the plaintiff is matter of evidence.

It is nevertheless a rule of law that the damage must be the natural and immediate consequence of the wrongful act. The defendant asserted that the plaintiff had cut his master's cordage, upon which the master had discharged the plaintiff from his service, although he was under an engagement to employ him for a term; but the court held that the discharge was not a ground of
[*65] action, since it was not the natural consequence of the words spoken (z); the damage must be attributable wholly to the words.

Where the reason which a party assigned for not employing the plaintiff was founded *partly* on the defendant's words and partly on the circumstance that he had been previously discharged by another master, it was held that no action was maintainable (a). Where the refusal of a third person to deal with the plaintiff in the way of his trade, is alleged as special damages, evidence is not admissible of the reason given by the customer to the plaintiff's agent for ceasing to deal; the customer himself must be called to prove his motive (b).

Where the defendant libelled a performer at a place of public entertainment, in consequence of which she refused to sing, and the plaintiff alleged, as special damage, that his oratorios had, in consequence, been more thinly attended, it was held by the
[*66] judge, on the trial, that the injury was too remote (c), and that it did not *appear but that the refusal to perform arose from caprice or indolence.

The plaintiff, having once recovered damages, cannot afterwards

(z) *Vicars v. Wilcox*, 8 East, 1; and see *Morris v. Langdale*, 2 B. & P. 184, where it was doubted whether the occasioning a third person to break his contract with the plaintiff was a sufficient special damage, since the plaintiff might obtain satisfaction, by action, for the breach of contract; and vide *supra* vol. I. p. 204.

(a) 8 East, 1.

(b) *Tilk v. Parsons*, 2 C. & P. 201. Cor. Best, C. J.

(c) *Lord Kenyon, Ashley v. Harrison*, 1 Esp. C. 48.

recover any ulterior compensation for any loss resulting from the same words (c).

It has been said that the plaintiff, in an action for a malicious prosecution, may give in evidence the circumstances of the defendant, in order to increase the damages. The principle, however, upon which such evidence is allowable, is not very obvious, and scarcely can be warranted unless the situation and rank of the defendant have affected the quantum of prejudice sustained by the plaintiff.

Where the words or libel are in themselves actionable, no proof of special damage is necessary, although such special damage should be alleged. But the plaintiff cannot in that case, any more than where the special damage is the gist of the action, give evidence of any consequential damage, which is not alleged in the declaration.

Where, in addition to the general issue, issues are joined on affirmative pleas of justification, the plaintiff's counsel may either in the first instance rebut the justification, or he may wait till the defendant has offered affirmative evidence *in proof [*67] of his justification, but he cannot divide his proof by giving part in evidence in the first instance and part afterwards (d).

Where the defendant has suffered judgment by default, it is not incumbent on the plaintiff to adduce any evidence on the execution of the writ of inquiry to assess the damages.

The proofs in an action for a *malicious prosecution* are, 1st, Of the prosecution; 2ndly, Of the defendant's malice, and the want of probable cause; 3dly, of probable cause; Of damage to the plaintiff.

1st. A *prosecution* by the *defendant*, from which the plaintiff has been *discharged*. If the prosecution was in the King's Bench, at the assizes, or quarter sessions, the fact of prosecution and acquittal

(c) B. N. P. 7.

(d) *Brown v. Murray*, 1 R. & M. 251. *Sylvester v. Hall*, ib. See *Rees v. Smith*, 2 Starkie's C. 31. *Delauny v. Mitchell*, 1 Starkie's C. 439. *Spooner v. Gardiner*, R. & M. 86. *Pierrepont v. Shapland*, 1 Carr. & P. 448.

(e) See *Clayton v. Nelson*, B. N. P. 13. *Kirk v. French*, 1 Esp. C. 81. *Morrison v. Kelly*, 1 Bl. R. 385. Starkie on Evidence tit. Malicious Prosecution.

must be proved in the usual way, by the production of the record, or proof of an examined copy of it (*e*). It is no objection to this proof, that no order of court, or fiat of the attorney general, allowing a copy of it to the party acquitted in a *case of felony, is proved (*f*). It must appear that the plaintiff was *acquitted* of the charge (*g*); it is not sufficient to prove that the proceeding was stayed by the *nolle prosequi* of the attorney-general (*h*); otherwise if he had pleaded not guilty, and the attorney general had confessed it (*i*); and it is sufficient [*69] that the *party was acquitted upon a defect in the indictment (*k*).

Some proof ought to be given of identity of the plaintiff with the party prosecuted. In order to prove that the defendant was the prosecutor, it may be desirable to be prepared with the original bill of indictment, for although the names of the witnesses on the back of the bill are no part of the record, it is evidence that they

(*f*) *Leggatt v. Tollervey*, 14 East. 302. *Jordan v. Lewis*, 2 Str. 1122. And Ford's M. S. The case of *Leggatt v. Tollervey*, above cited, overruled that of *Guinn v. Phillips*, Monmouth summer assizes, 1763, where Adams, B. held, that a copy of the record in felony ought not to be received, unless it had been ordered by the judge (see Selw. N. P. 1063). But he held that in all cases of indictments for misdemeanors, a defendant is entitled to a copy of the record. And the same distinction was taken by Lord Mansfield, C. J. in *Morrison v. Kelly*, 1 Bl. R. 385, where the prosecution, however, had been for a misdemeanor. Among the orders and directions to be observed by justices of the peace, at the Old Bailey, 2 G. c. 2. prefixed to Kelyng's Crown Cases, is one which directs "that no copy of any indictment for felony be given without special order, or motion made in the open court, at the general goal delivery; because the late frequency of actions against prosecutors, which cannot be without copies of the indictments, deterreth people from prosecuting for the king upon just occasions."

(*g*) *Hunter v. French*, Willes, 517.

(*h*) *Goddard v. Smith*, 6 Mod. 262; for, notwithstanding the *nolle prosequi*, fresh process may be sued out upon the indictment. *Ibid.* per Ld. Holt; but it was said that there had been no instance of any further proceeding after a *nolle prosequi*. *Ibid.* S. C. Salk. 21. Note that the declaration alleged an *acquittal*, but the court held that the entry of a *nolle prosequi*, did not amount to an *acquittal*.

(*i*) *Ibid.*

(*k*) *Wicks v Fentham*, 4 T. R. 247.

were sworn to the bill (*l*) ; but it may be proved that the defendant was a witness, without producing the bill (*m*) ; and the indorsement of the party's name as a witness on the bill is no evidence that he was the prosecutor (*n*). Where the defendant merely acted as a magistrate, the "proof of his name on the back ['70] of the indictment, as prosecutor, will not render him liable (*o*). The proper evidence to establish this fact is, that the defendant employed an attorney or agent to conduct the prosecution ; that he gave instructions concerning it ; paid the expenses ; procured the attendance of witnesses, or was otherwise active in forwarding the prosecution. It has been said, that a grand juror may be called to prove that the defendant was the prosecutor (*p*) ; this, however, appears to be doubtful.

Where the substance only of the charge contained in the judgment or information before a magistrate is alleged, it seems that a variance will not be material, unless the charge itself be different (*q*).

If the proceeding was by preferring a charge before a magistrate,

(*l*) Per Holt. C. J. in *Johnson & Ux. v. Browning*, 6 Mod. 216.

(*m*) Ibid. per Ld. Holt.

(*n*) 1 Vent. 47. B. N. P. 14. It is a question of fact for the jury to determine, who was the prosecutor. Ld. Ellenborough, C. J. in *R. v. Cromwell*, 4 M. & S. 507, observed, that "in an action for a malicious prosecution, if the prosecutor be kept out of sight, it sometimes becomes a point of very subtle evidence to determine who is the prosecutor ; but *id certum est, quod certum reddi potest* ; and it is a question to be ascertained by inquiry and evidence." See also *R. v. Smith*, 1 Burr. 54. *R. v. Kettleworth*, 5 T. R. 33, in neither of which was the prosecutor's name in the indictment. Sometimes it is the business of the court to make the inquiry. Ib. and *R. v. Incedon*, 1 M. & S. 268.

(*o*) *Girlington v. Pitfield*, 1 Vent. 47.

(*p*) *Sykes v. Dunbar*, Selw. N. P. 1066. 7th ed. This evidence is said to have been admitted by Ld. Kenyon, on the ground that this was a question of fact, the disclosure of which did not involve a breach of the grand juryman's oath ; but yet it seems, that either the witness must disclose the whole that passed, or the defendant would be precluded from ascertaining, upon cross-examination, the grounds from which the witness drew his general inference that the defendant was the prosecutor.

(*q*) *Supra* vol. I. p. 446.

the magistrate or his clerk should be served with a *sub-pœna duces tecum*, to *produce the proceedings (*r*). If the information was laid by the defendant, his taking the oath, an dhand writing, should be proved, as also the issuing the warrant to the constable, &c. ; the warrant must also be produced and proved, and evidence must be given of the apprehension and detention of the plaintiff under the warrant, and his ultimate discharge must also be shown.

Where evidence was given of the loss of the warrant, parol evidence of its contents was admitted without proof of the information (*s*).

2dly. Malice and the want of probable cause.—If a party prosecute another on a criminal charge, it is a rule of law, which seems to be founded upon principles of policy and convenience, that the prosecutor shall be protected in so doing, however malicious his private motives *may have been, provided he had probable cause (*t*) for preferring the charge.

(*r*) Where the declaration alleged an information before a magistrate, and evidence was offered of an admission by the defendant that he had laid an information before a magistrate, and it appeared from the evidence of the magistrate's clerk, that the practice was to take such information in writing, but no evidence was given of the information itself, the plaintiff was nonsuited. *Smith v. Walker*, Cor. Bayley, J. York summer assizes, 1821.

(*s*) *Newsam v. Carr*, 2 Starkie's C. 70. Cor. Wood, B. Note, it did not appear that any information had been taken, and yet it seems that it is to be presumed in a case of felony that one has been taken.

(*t*) 1 T. R. 520. 1 Salk. 14, 15, 21; 5 Mod. 394, 405. 1 Vent. 86. Carth. 415. Where a party robbed or injured merely states actual facts to a magistrate, on which the latter acts according to his own discretion, the action it seems is not maintainable. The complainant cannot, in propriety, be said to be the prosecutor of the person against whom the magistrate may think fit to issue his warrant; and whether there be or be not probable cause for issuing the warrant, there was, at all events, probable cause for making the statement, and no malice can be inferred from a mere statement of facts according to the truth. Where the defendant went before a magistrate, and stated the fact of his having lost a bill of exchange, and the magistrate's clerk stated the substance, but added that the plaintiff had feloniously stolen the bill; there being no evidence of malice on the part of the defendant, it was held that the plaintiff had been properly nonsuited. *Cohen v. Morgan*, 6 D. & R. 8.

This protection appears to be not only one of convenience, but of justice, or even of necessity, when it is considered how often it happens that the facts upon which a prosecution is properly founded are confined to the knowledge of the prosecutor alone ; and if this proof were not to be required on the part of the plaintiff, every prosecutor would in such a case be left exposed to an action, against which he might have no defence (*u*), if malice were to be inferred from the apparent want of probable cause.

*It has already been seen, that what will amount to probable cause, may be either a question of *law*, to be decided by the court on the particular facts, as found by the jury, or [*73] may be a conclusion or inference of fact to be drawn by the jury (*x*). Evidence of the most express malice will not dispense with proof of the absence of probable cause (*y*).

Where, upon an indictment for a malicious prosecution for perjury, it appeared that part of the affidavit on which perjury had been assigned had been falsely sworn, but that there was no probable cause for some assignments of perjury, *on some of the transactions contained in the affidavit, it was held that the [*74] action was maintainable (*y*), for there being no probable cause for some of the charges in the indictment, it was preferred with probable cause (*z*).

(*u*) See *Ld. Kenyon's* observations in *Sykes v. Dunbar*, 1 Camp. 202, in note ; and in *Smith v. Macdonald*, 3 Esp. C. 6. These reasons do not, as has been seen, apply to a case where a party makes an extra-judicial charge against another.

(*x*) *Supra* vol. I. p. 279. Where a felony has been committed, though not by the plaintiff, a private person may justify not only a prosecution, but even an actual arrest, if he acted on fair and reasonable grounds of suspicion. But in an action of trespass, it would be necessary that the defendant (not being a peace officer,) should plead specially the grounds on which he acted. See *Mure v. Kaye*, 4 Taunt. 34. *M'Cloughan v. Clayton*, 2 Starkie's C. 445. Haw. b. 2, c. 12. s. 15. In such cases, therefore, it may be a question of law for the court, whether the circumstances were sufficient to justify an arrest. No one who did not himself believe, on facts within his knowledge, that the party was guilty, would be justified in making an arrest. Haw. b. 2, c. 12, s. 15. *Sir Anthony Ashley's* case, 12 Co. 92.

(*y*) *Turner v. Turner*, 1 Gow. 50.

(*y*) *Reed v. Taylor*, 4 Taunt. 616.

(*z*) *Per Gibbs, C. J.* *Reed v. Taylor*, 4 Taunt. 616

The fact of *malice*, which is a question for the jury (*a*), is [*75] usually inferred from the want of any *probable cause for the prosecution (*b*). No evidence of malice can be more cogent than the proof that the defendant *knew* that the plaintiff was innocent [*a a*].

It is invariably necessary, in an action of this nature, to give

(*a*) See *Johnstone v. Sutton*, 1 T. R. 543. Yet there may be cases so circumstanced, that though the courts might not go so far as to infer malice in point of law, without the aid of a jury, yet they would leave it to the jury to imply malice. Where a bank inspector, in the absence of circumstances which would justify suspicion, charged the holder of a forged bank-note, which he had refused to give up to the inspector, with a felonious possession of the note, *Ld. Ellenborough* said, that to press for a commitment, under such circumstances, was such a *crassa ignorantia*, that it amounted to malice. *Brookes v. Warwick*, 2 Starkie's C. 389. See also *Isaacs v. Brand*, 2 Starkie's C. 167. *Supra*, vol. I. p. 282, in the note. The defendant had held the plaintiff to bail, as administratrix, for a debt due from the estate; and upon the trial of the action, for maliciously holding to bail, the plaintiff relied wholly on the mere fact of her having been held to bail, when she was not liable to arrest, and gave no extrinsic evidence of malice. The jury having found a verdict for the plaintiff, with five shillings damages, the court upon a motion for a new trial, doubted whether the very fact of holding the party to bail, under such circumstances, was not evidence from which malice was to be *implied*, and refused to disturb the verdict. *Fletcher v. Webb*, 11 Price 381.

(*b*) *Inledon v. Berry*, 1 Camp. 403. *Saville v. Roberts*, 1 Salk. 14. *Ld. Ray*. 374.

[*a a*] Where an indictment had been preferred against the plaintiff and *another*, and a copy had been obtained on behalf of the *latter only*, it was held that the plaintiff was entitled to use it in evidence, and the court would not inquire by what means it had been obtained. It was also held, that misconduct, on the part of the defendant towards the *other* party indicted was evidence, as part of the *res gestæ*, and as tending to show the malice of the defendant. The court also held, that it was no bar to the plaintiff's recovering that a rule for a criminal information had been obtained, but not proceeded in. *Caddy v. Barlow* 1 M. & R. 275.

A bill of exchange was addressed to Mr. J. Spencer, No. 3, Sidmouth-Street, and purported to be accepted by him; the plaintiff's name was J. Spence, and he resided at No. 3, Sidmouth Street, but the acceptance was not his; and when the bill was at maturity, he denied the acceptance, but the fact of denial was not communicated to the defendant, the holder of the bill. The defendant having arrested the plaintiff, it was held, in an action for malicious arrest, that there was no evidence of malice, and the plaintiff was nonsuited. *Spence v. Jacob*, 1 M. & M. 180.

some positive evidence, arising out of the circumstances of the prosecution, to show that it was groundless; it is insufficient to prove a mere acquittal, or even to prove any neglect or omission on the part of the defendant to make good his charge, for, as was observed in the case of *Purcell v. Macnamara* (c), the prosecution may have been commenced and abandoned from the purest and most laudable motives.

Thus it is not enough to show, that on an indictment of the plaintiff by the defendant for perjury, the former was acquitted upon the trial, on failure of the prosecutor's appearance when called (d); even although the facts lay within the defendant's knowledge, who, had there been *the least foundation for the prosecution might have proved it (e). [*76]

Or to prove that the bill was thrown out by the grand jury (f),

(c) *Purcell v. Macnamara*, 9 East. 361. *Sykes v. Dunbar*, cited 9 East. 363, in the note where Ld. Kenyon ruled, that it was not sufficient for the plaintiff to show his acquittal, without going farther and giving evidence of malice in the defendant.

(d) *Ibid.*

(e) The circumstance, that in the particular case the facts are peculiarly within the knowledge of the prosecutor, and the proof of them within his reach, would clearly be an insufficient reason for departing from the general rule, which seems to be founded partly on the difficulty under which a defendant must often labour, in proving by other witnesses the cause which he had for instituting the prosecution. In Buller's *Nisi Prius* 14, it is laid down, that where the facts are in the knowledge of the defendant himself, he must show a probable cause, though the indictment has been found by a grand jury, or the plaintiff shall recover, without proof of express malice; for this position, the case of *Parrott v. Fishwick*, Lond. Sitt. after Trin. T. 1772, is referred to; but from the note of this case, given 9 East. 362, it appears that where a defendant had been acquitted by verdict, Ld. Mansfield, in summing up, said, "That it was not necessary to prove express malice; for if it appeared that there was no probable cause, that was sufficient to prove implied malice, which was all that was necessary to be proved to support this action. For in that case all the facts lay within the defendant's own knowledge; and if there were the least foundation for the prosecution, it was in his power, and incumbent on him to prove it." Verdict for the plaintiff, damages £50. It is observed by Mr. East, in the note referred to, that it was perfectly consistent with the summing up, that the plaintiff had given *prima facie* evidence to negative any probable cause.

(f) *Byne v. Moore*, Marsh 12.

[*77] or that the defendant, after *charging the plaintiff on oath with an assault, omitted to prefer an indictment (*g*).

Where the prosecutor has abandoned the prosecution without giving any evidence, and it is proved that the defendant was actuated by *malicious motives* in preferring the bill, although some evidence must still be given of the want of probable cause, slight evidence will be sufficient (*h*).

In an action against a magistrate for a malicious conviction, the question is not whether there was probable cause in fact for convicting, but whether *he* had any probable cause for convicting, and for this purpose, what passed before him upon the hearing is not only proper, but essential evidence with a view to the question of malice (*i*).

The proof of malice in this action (as has already been observed), usually results from the want of probable cause, which when once established affords the strongest presumption of malice (*j*). Evidence as to the conduct of the defendant in the course of the transaction, his declarations on the subject, and any forwardness and activity in exposing the plaintiff by a publication of

[*78] *the proceedings, is properly adduced to prove malice (*k*).

It seems also, that the plaintiff may give in evidence the proof adduced by defendant on the trial of the charge (*l*). So he may give in evidence publications by the defendant on the subject of the charge (*m*).

Where the defendant, a bank inspector, had procured the plaintiff, a tradesman to be taken into custody on a charge of having in his possession a forged bank note, without legal excuse, because he had refused, after paying the amount to the person to whom he had paid

(*g*) *Wallace v. Alpine*, 2 Camp. 204.

(*h*) *Per Le Blanc, J. Inledon v. Berry*, 1 Camp. 203, in the note.

(*i*) *Burley v. Bethune*, 5 Taunt. 580.

(*j*) See 5 Taunt. 583.

(*k*) Str. 691.

(*l*) B. N. P. 13. 14.

(*m*) *Chambers v. Robinson*, Str. 691, where the plaintiff gave in evidence an advertisement published by the defendant, pending the prosecution of an indictment for perjury, though an information had been granted; but the chief justice informed the jury that they were not to consider it in damages, but only as a circumstance of malice.

it away, to deliver it up to the inspector, *Ld. Ellenborough* held that the pressing a commitment, under such circumstances, was such *crassa ignorantia* that it amounted to malice (*n*).

*The defendant may give in evidence any facts which show that he had *probable cause* for prosecuting, and that he acted *bonâ fide* upon that ground of suspicion. It is no answer [*79] to the action that the defendant acted upon the opinion of counsel, if the statement of facts upon which the opinion was founded was incorrect, or the opinion itself unwarranted (*o*).

If it appear that the jury, upon the trial of the plaintiff, entertained doubts upon the evidence, and deliberated as to his guilt after the case was concluded, the fact is, it seems, evidence of a *probable cause* (*p*).

*It is obviously of importance to prove that a felony has been committed (*q*), and to be prepared with proof of such cir-

(*n*) *Brookes v. Warwick*, 2 Starkie's C. 389. The plaintiff had taken the note in the usual course of business, and paid it in the usual course to B. The note being stopped at the bank was stamped as a forgery, and brought by an inspector to the plaintiff. The plaintiff paid the amount to B. and refused to give it up to the inspector, insisting on his right to retain it. The inspector, without any ground for suspicion, charged the plaintiff with feloniously having the note in his possession, without lawful excuse. The case was very pertinaciously pressed on the part of the defendant, although *Ld. Ellenborough* had, early in the cause, expressed a strong opinion on the subject, and left it to the jury upon the ground of malice. The jury found for the plaintiff, damages £50.

(*o*) *Hewlett v. Crutchley*, 5 Taunt. 277.—*Supra* vol. I. p. 281, note.

(*p*) In *Smith v. Macdonald*, 3 Esp. C. 7, *Ld. Kenyon* held, that if the jury paused before they acquitted the plaintiff upon his trial for the offence, he should hold that there was *probable cause* for the prosecution. It does not appear, whether in that case the evidence rested upon the testimony of the prosecutor, the defendant in the action. It is also to be observed, that there was no evidence to negative *probable cause*, a circumstance in itself sufficient to warrant a non-suit. See also, *Lilnal v. Smallman*, Selw. 946. *Golding v. Crowle*, B. N. P. 14.

(*q*) In *Johnson v. Browning*, 6 Mod. 216, *Ld. Holt* seems to have considered this proof to be essential to the defence; but it seems to be a good defence to prove reasonable grounds for suspecting the guilt of the plaintiff, although no felony was committed. See *Samuel v. Payne*, Dougl. 345. *Ledwith v. Catchpole*, Cald. 291.

[*80] cumstances as tend to throw suspicion on the plaintiff (*r*).
—This, however, would probably be deemed to be insufficient in case of express proof that the defendant knew that the prosecution was without foundation.

In the case of *Johnson v. Browning* (*s*), where it appeared that no one was present at the time of the supposed robbery but the wife of the defendant in the action, *Ld. Holt* admitted evidence of what she swore at the trial of the indictment; but it is obvious that this was done under the impression that it was incumbent on the defendant to establish the fact of probable cause, although no evidence were given to establish the negative.

[*81] *Where the plaintiff has been arrested on a charge of larceny, it has been doubted whether the defendant, after having given some evidence of probable cause, can give evidence to prove that the plaintiff was a man of bad character (*t*); but it seems that although such evidence affords no presumption of probable cause in the particular instance (*u*), yet that it is matter admissible in mitigation of damages.

3dly. The damage sustained.—The plaintiff may prove in aggravation of damages the length of imprisonment, his expenses, situation and circumstances. The peril and jeopardy in which a man's life and liberty are placed by a malicious prosecution, or the prejudice to his fame and reputation, constitute a sufficient ground of action (*x*);

(*r*) See *Knight v. Germain*, *Cro. Eliz.* 134. *Pain v. Rochester*, *Cro. Eliz.* 871.

(*s*) 6 *Mod.* 216. In *B. N. P.* 14, citing *Cobb v. Carr*, it is said, that the defendant's evidence of what he swore upon the trial of the indictment is evidence; this, however, does not seem to be warranted, for if the principle of necessity, operated in such a case, the effect would be to admit the testimony of the defendant himself, by which means the plaintiff would have the benefit of a cross-examination.

(*t*) In the case of *Rodriguez v. Tadmire*, 2 *Esp. C.* 721, *Lord Kenyon* admitted general evidence to that effect. In *Newsam v. Carr*, 2 *Starkie's C.* 69, *Cor. Wood, B.* where a witness was asked whether the plaintiff's house had not been searched on former occasions, and whether he was not a man of suspicious character, *Wood, B.* overruled the question, observing, that in actions of slander such evidence would be admissible to mitigate the damages, but that in the present case, it would afford no evidence of probable cause.

(*u*) *Ibid.*

(*x*) *Savil v. Roberts*, *B. N. P.* 13.

so although neither his fame nor liberty be affected, if he has been put to needless expense *to defend himself (*y*). [*82] In the assessment of damages, the costs incurred by the plaintiff are to be estimated as between attorney and client (*z*).

If a man be falsely and maliciously indicted of a crime which is a scandal to him, and hurts his fame, an action lies, although the indictment be insufficient, or an ignoramus be found (*a*) ; for although no expense may have been incurred, the mischief of the slander has been effected (*b*).

A plaintiff cannot upon the trial object to the insufficiency of a plea of justification in point of law (*c*).

Upon the execution of a writ of inquiry, where the defendant in an action for slander has allowed judgment to go by default, it is not incumbent on the plaintiff to give any evidence. The jury, in the absence of evidence, are not confined to nominal damages (*d*).

A member of parliament may be called upon *to state [*83] (*e*) whether another member took part in a particular discussion, but cannot be examined as to what was said in the course of the debate.

In *Curry v. Walter* (*f*), a barrister subpœnaed, to prove that he had made a motion in the court of King's Bench for a criminal information against the plaintiff, for publishing which the latter brought his action. Upon the trial, Eyre, C. J. was of opinion that it was improper to call a barrister as a witness to prove such a circumstance, but that the party ought to prove it by other means ; that it was at the option of the counsel to give or withhold his testimony.

(*y*) B. N. P. 14. This was formerly doubted, *ibid*. But it has been decided, that such an action lies by the husband for the expense of defending his wife, B. N. P. 13. *Jones v. Gwynn*, 10 Mod. 214 ; 1 Salk. 15 ; Gilb. 185.

(*z*) *Sandback v. Thomas*, 1 Starkie's C. 306. But see *Sinclair v. Eldred*, 4 Taunt. 7.

(*a*) *Savil v. Roberts*, B. N. P. 13 ; *Chambers v. Robinson*, Stra. 691.

(*b*) *Ibid*.

(*c*) *Edmonds v. Walter* 3 Starkie's C. 7.

(*d*) *Tripp v. Thomas*, 3 B. & C. 427.

(*e*) 5 Esp. R. 136.

(*f*) 1 Esp. 456.

CHAPTER II.

EVIDENCE FOR THE DEFENDANT.

[*84] *It has already been seen of what means of defence the defendant may avail himself under the plea of the general issue (*a*).

Under that plea it is incumbent on the plaintiff to establish his cause of action as alleged in the declaration ; but where he has once established a *primâ facie* case by proof of the speaking or publishing matter which, unexplained, is injurious and actionable, it lies on the defendant to explain it if he can, and to show by reference to circumstances, that the supposed slander or libel was not in fact used in an injurious and actionable sense (*b*), or that it was

[*85] used under *circumstances which afforded either an absolute or qualified justification (*c*).

(*a*) Supra. vol. I. p. 453.

(*b*) Cro. J. 114. B. N. P. 5. Vide supra vol. I. c. 8. & 13. In the case of *Wilson v. Stephenson*, 2 Price 282, the jury found that words charging the plaintiff with being a murderer, and having murdered his brother, had been spoken by the defendant, but had not been spoken maliciously, and a verdict having been entered on this finding for the defendant, the court refused a new trial, being of opinion that it was entirely a question for the jury although evidence had been given of other language of reprobation used at the same time, and in fact the plaintiff had been the innocent cause of his brother's death by the discharge of a small cannon. But see the case of *Bromage v. Prosser*, supra vol. I. p. 221.

(*c*) Supra vol. I. p. 229.

In the case of *Penfold v. Westcote* (*d*), it was proved that the defendant said of the plaintiff, "Why do not you come out, you blackguard rascal scoundrel? Penfold, you are a thief." The witness who proved the words was not asked whether by the word thief he understood that the defendant meant to charge the plaintiff with felony.

Chambre, J. in his direction to the jury, said that it lay on the defendant to show that felony was not imputed by the word thief. And after a verdict for the plaintiff, a new trial was refused.

The defendant, according to the ordinary rule, is entitled to have the whole of the alleged libel read (*e*), or the whole of the conversation in which the slander complained of was spoken, detailed in evidence. For he is entitled to show by the whole context, that the alleged libel or words *were not in fact [*86] used in an actionable sense. And where a letter of the defendant's was read, which referred to an account of the transaction related in a newspaper, that newspaper, it was held, was evidence (*f*).

Where it plainly appears from the context, that the words were not used in a felonious sense, the plaintiff will be nonsuited upon his own showing (*g*).

Where the defendant shows facts in defence as an answer to the action in the absence of express malice, it is still a question for the court whether in point of law the slander does not manifestly exceed the limits of communication which such an occasion would justify: when that is the case, the question of express malice is not to be left to the jury (*h*) [1].

(*d*) 2 N. R. 335. *Christie v. Cowell*, Peake's C. 4. Sel. N. P. 1250.

(*e*) *Cooke v. Hughes*, 1 R. & M 112.

(*f*) *Weaver v. Loyd*, 2 C. & P. 296. Cor. Garrow, B.

(*g*) *Thompson v. Bernard*, 1 Camp. C. 48. See note *k*. p. 86. vol. I.

(*h*) *Godson v. Flower*, 2 B. & B. 7. The defendant wrote a letter, blaming the party addressed for employing the plaintiff (an attorney), adding, "If you will be misled by an attorney who only considers his own interest, you will have to repent it, &c." It was held that the jury were properly directed to consider whether the expression were meant of the profession in general, or of the plaintiff in particular, and that it was not necessary to leave it to them

[*87] *The defendant may also show in defence, that the plaintiff himself procured the act to be done of which he complains (*i*).

The plaintiff cannot recover if the vocation in which he is libelled be an illegal one (*k*).

It is perfectly well settled, that the defendant cannot, under the plea of the general issue, in an ordinary action for slander, go into evidence of the truth of the imputation, even for the purpose of mitigating the damages (*l*) [1].

[*88] But doubts have arisen upon the question to what extent the defendant is at liberty to impeach the *plaintiff's character, by affecting him with a suspicion of the truth of the alleged calumny (*m*) [2].

The main question seems to have been, whether the defendant be at liberty to do more than to impeach the plaintiff's character by

whether it was a *bonâ fide* or *malicious* publication ; and Richardson, J. observed, " If a man giving advice call another a thief, surely it is not necessary to leave it to the jury whether this is a confidential communication." And see *Brown v. Broom*, 2 Starkie's C. 297.

[1] This doctrine is doubted. See note [1], p. 356, *infra*.

(*i*) *King v. Waring*, 5 Esp. C. 13. Where the witness in an action for a libel stated, that having heard that the defendant had a copy of the print (alleged to be libellous), he went to his house and requested to see it, on which the defendant produced it, and pointed out the figure of the plaintiff and the other persons ridiculed, *Ld. Ellenborough* held, that the publication was insufficient. *Smith v. Wood*, 3 Camp. 323. *Tamen quare*, for there was no evidence to show that the plaintiff was in privity with the witness.

(*k*) *Hurst v. Bell*, 1 Bingh. 1, where the plaintiff complained of having been libelled in his vocation as an exhibitor of sparring matches ; nor does an action lie for a libel against a party touching his conduct in any illegal transaction. *Yrissari v. Clement*, 3 Bingh. 432. *Secus* where the matter is independent of the illegal transaction, though arising out of it.

(*l*) See the resolution of the judges in *Underwood v. Parkes*, Str. 1200. *Mullett v. Hulton*, 4 Esp. C. 248. *Infra*. 98.

(*m*) See *Mullett v. Hulton*, 4 Esp. C. 248. *The Earl of Leicester v. Walter*, 2 Camp. C. 251. 1 M. & S. 284, and *infra* 89, 90, &c.

[1] See vol. I. p. 233, note [1].

[2] See note [1] page 97, *infra*.

general evidence, or whether he be also entitled to go into evidence of particular facts, tending to show that the plaintiff had been guilty of the particular act imputed to him.

General evidence to show that the plaintiff, previously to the alleged slander, laboured under a general suspicion of having been guilty of similar practices, seems in principle to be admissible, as immediately and necessarily connected with the question of damages. He complains of loss of reputation, and that he has been deprived of his character by the act of the defendant. Is not the defendant, then, to be permitted to show that the plaintiff's character was previously tainted with suspicion, or that he had in fact little character or reputation to lose? To deny this, would be to decide that a man of the worst of character was entitled to the same measure of damages with one of unsullied and unblemished reputation; a reputed thief would be placed on the same footing with the most honourable merchant—a virtuous woman, [*89] with the most abandoned prostitute.

To enable the jury to estimate the probable quantum of injury sustained, a knowledge of the party's previous character is not only material, but seems to be absolutely essential (n).

(n) Lord Ellenborough, C. J. in the case of — Moore, 1 M. and S. 284, laid down both the rule itself, and the principle on which it is founded, in the most clear and explicit manner; he observes, “Certainly a person of disparaged fame is not entitled to the same measure of damages with one whose character is unblemished, and it is competent to show that by evidence.” And Grose and Bayley, Js. agreed, that such evidence was admissible in mitigation of damages.

In the case of the Earl of Leicester v. Walter, 2 Camp. C. 251, an action was brought for a libel published in the Morning Herald, imputing to the plaintiff the offence for which Lord Audley suffered in the reign of Ch. I. The declaration contained the usual exculpatory averments, and stated that the plaintiff had lost the society of many worthy subjects in consequence of the publication. The defendant pleaded not guilty.

Upon the trial before Sir J. Mansfield, C. J. evidence was offered in mitigation of damages, that at the time of the publication the plaintiff was generally suspected to have been guilty of the charge imputed, and that in consequence of this general suspicion his acquaintance had deserted him.

This evidence was objected to. It was contended that it would be in vain to bring an action if such evidence were permitted; that a plaintiff could not come prepared to defend every act of his life. That there was nothing on the

- [*90] *The question whether the defendant should be permitted to adduce evidence of particular facts, *tending to
 [*91] shew that the plaintiff was really guilty of the charge

record to put the character in issue; and that to admit such evidence would only be giving the defendant an opportunity of continuing and aggravating the original libel.

Sir J. Mansfield, C. J. admitted the evidence, observing, that he could never answer to his own satisfaction, the arguments used for the plaintiff. That since it had been held that *any thing short of proving the charge imputed in the libel was evidence in mitigation, he did not know how to reject the witnesses.* Besides that, the declaration stated that the plaintiff had always preserved a good character in society, from which he had been driven by the insinuations in the libel. That the question for the jury was, whether the plaintiff had actually suffered this grievance or not, and therefore that evidence to show that his character was in as bad a situation before, as after the libel, must be admitted.

The learned judge in summing up, directed the jury to consider, in assessing the damages, whether the reports which had been proved were sufficient to show that the plaintiff could receive little injury; and that, in this point of view, it did not matter whether, the reports were well or ill-founded, provided they got into many men's mouths.

In the case of *Williams v. Callender*, Holt's C. 307, Lord Ellenborough is reported to have said, that "though there was no justification on the record, the defendant might give in evidence somewhat of the real character of the plaintiff, and show that it was not unblemished and entire." And see *Holt's Law of Libel*, 270.

In the case of *Ellershaw v. Robinson and Ux.* Sum. Sp. Ass. 1824, which was an action for words imputing to the plaintiff, a widow, an adulterous intercourse with Robinson, in consequence of which special damage had been sustained, Holroyd, J. held, that it would be competent to the defendants to go into general evidence to impeach the plaintiff's character for chastity. See also *Famer v. Merle*, cited in the case of the *Earl of Leicester v. Walter*, 2 Camp. 251.

In the case of *Jones v. Stevens*, 11 Price 235, which was an action for a libel on the plaintiff in his character of attorney, and containing general reflections on the plaintiff's professional conduct and respectability,—the defendant pleaded the general issue, and several pleas of justification, some of which alleged, in very general terms, that the plaintiff had conducted himself in an unprofessional and disreputable manner. On the trial, the defendant proposed to prove by witnesses in support of the pleas of justification, and in contradiction of the general averment in the declaration that the plaintiff had carried on the profession and business of an attorney with great credit and reputation, that the plaintiff was of general bad character and repute in his business of an attorney;

imputed to him, stands on a *very different foundation. [*92]
 To allow this, generally, would be to overturn the rule
 laid down, *in the case of *Underwood v. Parkes*, by all [*93]

but the evidence was rejected by the Chief Baron as inadmissible: and on motion, afterwards, for a new trial, the court of Exchequer was of the same opinion, and held with many forcible observations, that such evidence was not admissible, either in mitigation of damages, or in support of any of the allegations contained in the pleas of justification. Wood, B. observed, "I have ever understood that general good character is always presumed in law, unless by evidence of particular acts, fairly and specifically put in issue, that presumption is negated. Some cases have been mentioned wherein it should seem that such evidence has been received at Nisi Prius: I will not attempt to distinguish the present from those—I strongly protest against any such mischievous doctrine altogether, and deny that it has any legal foundation.

In the above case, that of *Waithman v. Weaver* was cited, to show the opinion of Abbott, L. C. J., that in an action for a libel on a tradesman, insinuating that he had been guilty of receiving stolen goods, evidence was inadmissible to show that the libel was no more than a repetition of rumours which were prevalent at the time, of the facts imputed to the plaintiff; and according to the report of the case in 11 Price 257, n. his lordship was not satisfied that he ought to receive the evidence, which was afterwards withdrawn. But according to the report of the same case, 1 D. & R. 10, the defendant's counsel offered in evidence *facts* short of a complete justification; and all that his lordship decided was, that *facts* were not admissible in evidence; and his lordship distinguished the case from that of the Earl of Leicester v. Walter, on the very distinction between evidence of *rumours* and evidence of *facts*. He observed, "The case of the Earl of Leicester v. Walter is very different from the present. There, evidence of rumours was admitted, to show that the plaintiff, having previously lost his character, had sustained no injury; here it is proposed to give not rumours, but facts, in evidence, and there is a vast distinction between rumours and facts. I think the rule is not so laid down in any of the cases which have been decided on this subject, as to preclude the exercise of my own judgment; and I am decidedly against the reception of the evidence proposed to be adduced. I own that I have always thought the rule to be, that under the general issue *facts* cannot be given in evidence, unless they are pleaded as matter of justification, and I have not been satisfied with any of the cases which have laid down a different position." Notwithstanding the respect which all must entertain who have had opportunities of judging of the profound learning and clear apprehension of the venerable judge (Wood, B.) who, in the case of *Jones v. Stevens*, expressed so strong and decisive an opinion on the inadmissibility of *general* evidence of previous bad character, in actions for slander, it may be permitted to remark, that though the law presumes in favour of character, it is but a presumption capable of proof to the

- [*94] the judges—that the truth of the imputation, should *not be given in evidence under the general issue, even in mitigation of damages ; for if, as seems *to have been held
- [*95]

contrary, and that in several instances the law does not permit character to be impeached by evidence of particular facts, but by general evidence only ; as where the general credibility of a witness is impeached, or the character of a prosecu^tix on a charge of rape. The principle on which such general evidence is admitted, whilst evidence of particular facts is excluded, has been frequently recognized : it is this,—that the party may be prepared with general evidence in support of character, though he cannot be supposed to be prepared with evidence to justify his conduct through life.

In *Snowdon v. Smith*, Devon. Lent Assizes, 1811, 1 M. & S. 286, note (a), in an action against the defendant for saying “ that he had heard that the plaintiff had been guilty of unnatural practices,” to which the defendant pleaded a *justification* alleging instances, Chambre, J. would not permit a witness to be asked whether such reports as the defendant had stated had not gone abroad, and held, that the case of the Earl of Leicester *v.* Walter did not apply, because the defendant had justified. Whether the evidence in this case was rightly rejected, or not, on the ground alleged in the report, it is clear that the learned judge did not mean to rule in opposition to the Earl of Leicester *v.* Walter. It might, perhaps, be difficult to sustain the distinction on the ground of a justification pleaded. The reason for admitting such evidence is to show, that in fact the plaintiff had sustained little injury as to character, and so to reduce the damages ; and that is a reason for admitting such evidence, which is wholly independent of the question of justification ; and for that purpose such evidence may be admissible, though wholly inadmissible as evidence to prove the justification. It is, however, to be observed, that there may be a distinction between evidence of *particular rumours*, such as was rejected in the case of *Snowdon v. Smith*, and *general evidence*, to show that the plaintiff’s character had been previously tainted and reduced. The plaintiff complains of loss of character ; the question is, what character had he to lose ? If he had but little, he can have lost but little ; and, strictly speaking, the evidence of mere rumours is not directly applicable for this purpose,—such rumours may have partially prevailed, but not have obtained credit. The proper questions seems to be, what was the plaintiff’s general character for honesty or humanity, according to the nature of the slander, previous to the alleged injury.

It may be observed, that the rule which excludes evidence of particular facts, which prove or tend to prove the truth of the alleged slander, is attended in practice with this inconvenience, that a defendant, for the sake of being admitted to give evidence of facts, which he might reasonably expect would, if disclosed, greatly reduce the damages, is under the necessity of pleading a justification which he knows he cannot support. If A. published that B. had com-

by Eyre. C. J. (*m*), the defendant might in mitigation of damages give any evidence short of such as would be a complete defence to the action; how would it be possible to draw the line, and to restrain the evidence of facts tending to throw suspicion on the plaintiff within such limits, that it should not produce actual conviction on the minds of the jury? The practice, it is obvious, would be attended with all the hardship and inconvenience which would result from admitting a complete justification under the general issue; for the plaintiff would be equally liable to surprise, and as little able to meet the charge in the one case as in the other.

No such objection applies to general evidence affecting the plaintiff's character, for every one who possesses a good character in society may come prepared with general evidence to support it, but no one can be ready to answer *particular [*96] charges unless he be previously apprized of them (*o*) [1].

mitted a robbery, and the fact was that B. had attempted a robbery, which, in legal strictness, was not consummated, A. in an action for the slander, must either plead a justification which he knows that he cannot prove, or he would be excluded from that evidence which ought to be followed by mere nominal damages [1]. In practice no great inconvenience is occasioned; in this, as in many other instances, a skilful pleader will resort to pleas of little or no use as to the issues founded upon them, but of the greatest importance with a view to the admission of evidence. The incongruity of rejecting evidence as to the quantum of damages, which ought materially to govern the amount, without pleading a false plea, might be avoided, as well as the inconvenience which would result from permitting such evidence to be given without notice, by admitting it conditionally, after due notice given to the plaintiff of the defendant's intention, to prove the specific facts in mitigation of damages.

(*m*) *Knobell v. Fuller*, *infra* 96.

(*o*) See the observations of Bayley, J. in *R. v. Watson*, 2 Starkie's C. 152.

[1] In the case of the Earl of Leicester *v. Walter*, 2 Camp. 251, the counsel for the defendant said *arguendo*: that in a case before Le Blanc, J. at Worcester, that learned judge received evidence *under the general issue*, that the plaintiff had been guilty of *attempts* to commit the crime which the defendant had imputed to him. According to this view of the law, which is believed to be entirely correct, the difficulty suggested by the learned author is obviated.

[1] Taking into view the whole of what is said in the text and notes of this chapter, on the subject of the plaintiff's *character*, in reference to the *question of damages*, it is undeniable that the courts in England do hold, that *general suspi-*

cions and *common reports* of the guilt of the accused may be given in evidence *in mitigation of damages*. Here, again, it is manifest that the learned author is not well content with the doctrine he feels himself bound to advance, and that he would gladly place the defence upon general evidence of the *bad character* of the plaintiff, as when the character of a witness for veracity is impeached, rather than upon evidence of suspicion and reports; but such has not been, nor is it now the law, as held in England. The doctrine there rests principally upon the cases of *Leicester v. Walter*, 2 Camp. 251; ——— *v. Moor*, 1 Maule & Sel. 281, and *Knobell v. Fuller*, *infra* p. 96, note [p]. It was adopted in Pennsylvania in *Williams and wife v. Mayer and wife*, 1 Binney 92 n; in Kentucky, in *Middleton and wife v. Calloway*, 2 A. K. Marshall's R. 372; in South Carolina, in *Buford v. M'Luny*, 1 Nott & M'Cord 268; in Connecticut, in *Hyde v. Bailey*, 3 Conn. R. 466, and in *Treat v. Browning*, 4 Conn. R. 414. On the other hand, the doctrine of the English courts has never prevailed in Virginia, Massachusetts or New-York: thus in Virginia, in *M'Alexander v. Harris*, 6 Munf. 465, evidence showing a probable ground of suspicion was refused to be received in mitigation of damages, although the English cases above referred to, were strongly enforced by counsel. In Massachusetts, the question was very fully considered in the case of *Wolcott v. Hall*, 6 Mass. R. 514, and the evidence held to be inadmissible. That case came before the court in 1810. On the trial, the defendant offered to prove *reports* current in the neighborhood, that the plaintiff was guilty of the crime imputed to him. C. J. PARSONS in pronouncing judgment, observed, "Evidence as to the *general character*, of the plaintiff, he may at all times encounter, if untrue; and if his character be generally bad, independent of the slander of which he complains, the jury may consider it, for the worth of a man's general reputation among his fellow-citizens may entitle him to large damages for an attempt to injure it, which he ought not to obtain if his character is of little value or no estimation in society. But evidence of the plaintiff's general character was not offered; but only an attempt to blast his reputation by *particular reports* which he might not have it in his power to silence, but by commencing this prosecution; and if such reports could be given in evidence, the subject of them, however innocent, instead of seeking redress from the laws, had better sink privately under the weight of unmerited calumny, lest by attempting his justification he should give notoriety to slanders which had before been circulated only in whispers." This doctrine was re-asserted by the same court, in *Alderman v. French*, 1 Pick. 1; and again in *Bodwell v. Swan and wife*, 3 Pick. 376. In the last case, PARKER, C. J. remarked, "It appears to us that the *rejection* of evidence offered by the defendant, *tending to prove* that the words spoken and charges made were true, in order to show that the wife *believed* what she said to be true, was right. It was so settled in *Alderman v. French*, and upon sound principle. In truth, such evidence would answer all the purposes of the defendant without exposing him to the just consequences of attempting to justify, and failing in the attempt; and this further mischief would follow: that the notice to the plaintiff of what

is intended to be proved which is given by a special plea of justification, would be withholden, so that the plaintiff would be taken by surprise, and have no opportunity to disprove the facts.

The modern refinements in the law of slander have been productive of more mischief than good. The defendants in such cases ought to be ready to take the ground openly, that what they have said is true, or they should be ready to discharge themselves of malice under the general issue in some of the ways which have been allowed as legitimate grounds of defence.

The same answer may be given to the offer of evidence, that there were *stories* and *rumors* in the neighborhood, of a nature to raise a belief in the mind of the wife that what she said was true. These very stories may have originated in slander; and character could not be protected if the third or fourth circulator should be able to defend himself or reduce the damages, because he only gave more publicity, and added the weight of his character to calumny which had been originated by others.

We take the rule to be that the *general bad character* of the plaintiff may be shewn, because he relies upon its goodness before calumniated, as the principal ground of damages. A fair character has been maliciously attacked, and the law will repair the mischief by damages; but to a reputation already soiled, the injury is small. The plaintiff is supposed also to be ready at all times to show the general goodness of his character; but it would be unreasonable to require of him to have witnesses ready to disprove particular facts which he has no notice are intended to be proved against him.

In *New-York*, the doctrine of *Wolcott v. Hall* 6 Mass. R. 514, was adopted by the Supreme Court in *Matson v. Buck*, 5 Cowen 499. See also to the same effect, *Brooks v. Bemiss*, 8 Johns. R. 455. *Root v. King*, 7 Cowen 629 to 631; *Mapes v. Weeks*, 4 Wendell 659; *Gilman v. Lowell*, 8 Wendell 579; and *Inman v. Foster*, Id. 602; and particularly *Root v. King* and *Gilman v. Lowell*, in which the English cases on this subject are reviewed and commented upon.

In this country it may be considered as settled law, that *evidence of general character*, may be given *in mitigation of damages*. *Springsteen v. Field*, Anthon's N. P. 105; *Paddock v. Salisbury*, 2 Cowen 811; *Root v. King*, 7 Cowen 634 and 4 Wendell 114, S. C. in error; *Wolcott v. Hall*, 6 Mass. R. 514; *Bodwell v. Swan and wife*, 3 Pick. 376; *Brunson v. Lynde*, 1 Root 354; *Seymour v. Merrills*, Id. 459; *Austin v. Hanchett*, 2 Root 149; *Vick v. Whitefield*, 2 Hayw. 222; *McLuny v. Buford*, 1 Nott & McCord, 268; *Elfert v. Sawyer*, 2 Nott & McCord 511.

In *Foot v. Tracy*, 1 Johns. R. 45, which arose as early as 1806, the question was left undecided, whether in an action for a *libel* the defendant could, under the plea of the general issue, give in evidence the *general character* of the plaintiff *in mitigation of damages*; Chief Justice KENT and J. THOMPSON being of opinion that the evidence was admissible, and Justices LIVINGSTON and TOMPKINS holding the reverse. Mr. Justice SPENCER delivered no opinion in that case but shortly afterwards, at a circuit where he presided, permitted such evidence to be given in mitigation in the case cited above of *Springsteen v. Field*.

[*97] In the case of *Knobell v. Fuller (p)*, evidence *was admitted at Nisi Prius, of specific facts, upon the general doctrine, that *any* evidence was admissible in mitigation which fell short of a complete justification; and in the case of the *Earl of Leicester v. Walter (q)*, Sir J. Mansfield, C. J. seems to have acceded to the general position; but in that case which the evidence was admitted was of a general nature and not of specific [1].

(p) An action was brought for a libel published in the Morning Post charging the plaintiff with having been concerned with a person of the name of Knowles in procuring money from the relatives and friends of persons convicted of capital offences, under pretence of being able to procure pardons through the interference of the Duke of Portland, in whose service the plaintiff was.

The defendant pleaded the general issue, and in mitigation of damages, offered evidence to prove strong grounds of suspicion against the plaintiff. Eyre, C. J. at first doubted whether this evidence was admissible.

Adair, Serj. for the defendant admitted that the defendant could not give in evidence on the general issue facts which, if pleaded, would amount to a justification; but contended that they might prove facts which showed there was cause of suspicion, and therefore proved that the defendants were not induced to publish this paper by reason of malice against the plaintiff, but for the purpose of conveying information to the public, this being a concern of a public nature. A note of the case of *Curry v. Walter* was then read, in which his Lordship admitted the distinction, and received such evidence.

Eyre, C. J. said, he believed, in that case, he admitted the evidence in order to show that the defendant had not in fact published a libel, he having only published the proceedings of a court of justice, which the court afterwards determined to be no libel in point of law; but he would not deny but he might also have received it in mitigation of damages: for though he had never known the evidence given in an action for a libel, yet he had always understood, that in an action for words the defendant might, in mitigation of damages, give *any evidence short of such as would be a complete defence to the action*, had a justification been pleaded.

The defendant then called Mr. Ford, a magistrate, to prove that, on the examination of the plaintiff before him, he *admitted* that he had received five guineas for conveying a letter to the Duke, and the Duke himself being examined, said, that thinking the plaintiff had misconducted himself in that respect, he had discharged him from his service.

(q) 2 Camp. 251. Supra 89.

[1] The principle advanced in *Knobell v. Fuller*, and recognized as sound law in the *Earl of Leicester v. Walter*, that a defendant may, in mitigation of damages, give any evidence short of such as would be a complete defence to the action, had a justification been pleaded has in England a wider influence than the mere

There seems to be no well-founded distinction as to the admission of *general evidence* of character, whether the defendant has simply

regulation of the proof as to the *character* of the plaintiff; it extends to the admission in evidence of *all the facts and circumstances* of the case which can have an influence in guiding the jury in determining the *quo animo* the words are spoken, and thus measuring the damages to be awarded to the plaintiff. Mr. Starkie feels embarrassed by the principle in the broad terms in which it is laid down in *Knobell v. Fuller*, considering it as interfering with the rule of *Underwood v. Parkes*, that the *truth* of the imputation cannot be given in evidence under the *general issue*, but that it must be specially pleaded, to render this evidence admissible. The practice, he says, would be attended with all the hardship and inconvenience which would result from admitting a complete justification under the general issue, for the plaintiff would be equally liable to surprise, and as little able to meet the charge in the one case as the other. The courts in this country have taken the same view of this question, holding that *evidence tending to prove* the truth of the charge, or *proof of particular facts* forming links in the chain of circumstantial evidence against the plaintiff, to establish the truth of the charge cannot be received under the *general issue* in mitigation of damages, *Warmouth and wife v. Cratner*, 3 Wendell 395; *Gilman v. Lowell*, 8 Id. 573; *Purple v. Horton*, 13 Id. 9; *Bodwell v. Swan*, 3 Pick. 277; *Treat v. Browning*, 4 Conn. R. 414, and *Cheatwood v. Mayo*, 5 Munf. 16. Admitting this view of the rule of *Knobell v. Fuller*, to be correct whilst the defendant attempts to justify, it is not perceived how it interferes with the practice of the courts, both of England and this country, to receive evidence of the facts and circumstances of the case, for the purpose of enabling the jury to pass upon the *quo animo* the words were spoken, or publication made and understandingly assess the damages which the defendant ought to pay. *East v. Chapman*, 1 Moody and Malkin 46; *Saunders v. Mills*, 6 Bing. 213; *Chalmers v. Shackell*, 6 Carr. & Payne 475; *Charlton v. Walton*, 6 Carr. and Payne 385. If the facts offered to be proved would establish or have a tendency to establish the truth of the charge, and the defendant has omitted to plead specially, the evidence of course must be rejected; but if all intention to prove the truth of the charge is disclaimed, and the evidence is offered solely for the purpose of giving a character to the malice which the law *implies* from the falsity of the charge; or in other words, to show that the defendant did not act wantonly and under the influence of *actual malice*, it cannot be rejected consistent with the principles of equity and justice, upon which the action for defamation is based. So the law is supposed to be conceded by the court in *Gilman v. Lowell*, 8 Wendell 582, and also in *Mapes v. Weeks*, 4 Id. 662, and *Root v. King*, 7 Cowen 633. See vol. I p. 455, n. [1] and same vol. p. 456, n. [1] for an enumeration of cases in which *the facts and circumstances of the case* may be shewn under the plea of the *general issue*.

pleaded the general issue, or has pleaded a justification as well as the general issue ; for the object of such evidence is to diminish the damages, which he is entitled to do, though he fail to establish his justification (r) [2].

(r) Lord Leicester *v.* Walter, 2 Camp. 251. 1 M. & S. 284. *Rodriguez v. Tadmire*, 2 Esp. C. 720. Vide supra 89.

[2] It is believed after a diligent examination, that it never has been decided, either at *nisi prius* or *in bank*, except in the case of *Snowdon v. Smith*, 1 Maule and Sel. 267, *n.* that a Defendant in an action of slander is not at liberty, under the plea, of the *general issue*, to give evidence in *mitigation of damages*, where with that plea, he has pleaded a *plea of justification*, but failed to establish it by proof. There are abundant *dicta* to that effect, but no decisions. In *Snowdon v. Smith*, the defendant offered to give evidence of *rumors* of a crime committed by the plaintiff, like that imputed to him, and CHAMBRE, J. refused to receive it, *because the defendant had put the issue upon the truth of the charge*. In *Kirkman v. Oxley*, however, which was an action for words charging the plaintiff with a larceny, HEATH, J. allowed the defendant, *who had justified*, to give evidence of the plaintiff's general character in *mitigation of damages*; Lincoln Sum. Assizes, 1815, reported in 1 Phill. Ev. 147, *n.* 2, third London ed. 1817. Again: in *Mawbray v. Barker*, where a justification was pleaded, together with the general issue, general evidence was admitted by Lord TENTERDEN, at the Lincoln Sum. Assizes, 1826, as the safer course: reported in 2 Phill. Ev. 250, *n.* 3, Gould's ed. of 1839, a copy of the seventh English edition, printed in 1829. The decision of *Snowdon v. Smith*, which was a *nisi prius* case, is thus not only over-balanced by two other *nisi prius* cases, but it is at war with the first principles of the law of slander, and of the rules of pleading. The defendant is allowed by statute to plead *double*—he may, if he think proper to do so, accompany his plea of *not guilty* with a plea of justification. Under the former plea, he can not only require the plaintiff to give the proofs necessary to sustain the action, but may shew the *facts and circumstances of the case*, to satisfy the jury that the words were spoken upon an occasion which protects him from liability to an action, either *absolutely* or *conditionally*, or to show the *quo animo*, the words were spoken, or that the plaintiff was a man of sullied reputation at the time of the speaking of the words, in mitigation of damages. How then can it be, that by availing himself of the right guaranteed to him by law, of pleading double, he should lose the benefit of *both* pleas if he fail in establishing *one*. It is true that in *Jackson v. Stetson*, 15 Mass. R. 57, such a doctrine was advanced, the court holding that a plea of justification not verified, relieved the plaintiff from the necessity of proving his case under the general issue; but the authority of that case has never been recognized by any court, other than that by which it was pronounced. In the same case, it was said too, that by a plea of justification not verified, the de-

The defendant is not allowed to prove, under the general issue, even in mitigation of damages, that *the [*98] specific fact in which the slander consists, and in respect

defendant is precluded from showing any facts in mitigation; but the opinion is *obiter*. In *Larned v. Buffinton*, 3 Mass. R. 553, it was said that when a defendant pleads a justification, and fails to verify his plea by proof, he is not at liberty, under the general issue, to show that the words were spoken through heat or passion, and not from malice; but he may prove that the plaintiff himself occasioned the charge, or in other words that the plaintiff, by his own conduct, gave cause of suspicion, and thus himself produced the mischief of which he complained. This case, it will be perceived, although cited to support the doctrine for which *Snowdon v. Smith* has been quoted, instead of doing so, holds directly the reverse, for it admits that notwithstanding the failure to support the plea of justification, evidence even in bar of the action, is admissible under the general issue. Besides, all that was said by the court on this subject is *obiter*.

On the other hand, in *Kennedy v. Gregory*, 1 Binney 85, a majority of the judges held that evidence which by the court was deemed *evidence in mitigation*, was admissible, although the defendant had pleaded a justification, and failed to prove it. In *Coleman v. Southwick*, 9 Johns. R. 46, evidence in mitigation was received in an action for a libel, although a plea of justification had been interposed, which was not verified by proof, and so also in *Hotchkiss v. Lathrop*, 1 Johns. R. 288. In *Root v. King*, 7 Cowen 613, 632, 633, evidence of the *general character* of the plaintiff was received on the trial *in mitigation of damages*, although the defendant had pleaded a justification, and which he failed to prove. C. J. Savage, on the motion for a new trial, after adverting to the doctrine laid down in 1 Phill. Ev. 147, on the authority of *Snowdon v. Smith*, that such evidence is not admissible when the defendant, by his plea, puts in issue *the truth of the charge*, cites the ruling in *Kirkman v. Oxley*, with approbation, and observes that by that case it seems that bad character generally may be shewn *under any state of pleadings*. Chancellor WALWORTH, in the Court of Errors in the same case, concurred in this opinion, and laid down the law to be, that in an action for a libel, the defendant may, *in all cases*, go into evidence of the *general character* of the plaintiff. He observed, "Some of the most recent decisions both in this country and in England seem to be in favor of allowing evidence of general bad character, although there is a justification. I am disposed to defer to those decisions;" but the Chancellor added that he was "satisfied the rights of plaintiffs and the safety of those who are accused of crime, will not allow the principle to be extended." 4 Wendell 139, 140. It will, however, be perceived that all the *dicta* on this subject, are founded on the ruling of CHAMBRE, J. in *Snowdon v. Smith*, and that the evidence rejected in that case was offered to show that the character of the plaintiff was tarnished previ-

of which the action is brought, was communicated to him by a third person (s).

But where the defendant has in the libel referred to the source from which he derived his information, he may, it seems, although he has not justified, prove, under the general issue, that he did in fact receive such information (t). As where the libel refers to a newspaper as the medium of communication (u).

In a late case the defendant was allowed to injure of a witness whether he had not read the substance of the alleged libel in a public newspaper (x).

In *Mullett v. Hulton*, (y), the declaration stated that the plaintiff was about to take a house, but that the defendant in order to prevent him, addressed a letter to the owner, containing the following passage: "Mr. Hulton cannot for a moment suppose that Mr. Salter is acquainted with the newspaper particulars relative to the party al-

ous to the speaking of the words. The decision of the judge, therefore, necessarily was limited to the admissibility of the evidence for that *particular purpose*, and did not embrace the general doctrine of what evidence was admissible in mitigation, when the defendant had put the issue upon the truth of the charge and failed to maintain it by proof. Besides: it is very questionable from the statement of the case of *Snowdon v. Smith*, in note (n) *supra* page 89, whether the principle *supposed* to have been advanced by Chambre J. was *in fact* advanced by him; it seems that he only held in that case that evidence of *rumours* was inadmissible in support of a *plea of justification*.

In 1849, the Legislature of New York enacted, that in an action for libel or slander the defendant may in his answer allege both the *truth* of the matter charged as defamatory, and any *mitigating circumstances*, to reduce the amount of damages. And whether he prove the justification or not, he may give in evidence the mitigating circumstances. Code as amended 1849, § 165.

A defendant failing in his proof of justification, may offer evidence in mitigation of damages, *Morehead v. Jones*, 2 B. Munroe 210.

So in an action for defamation either party may with a view to the damages give evidence to *prove* or *disprove* the existence of a malicious motive; but if the evidence given for that purpose by a plaintiff, establishes another cause of action, the jury should be cautioned against giving damages in respect to such other cause of action, *Pearson v. Lemaitre*, 5 Mann. & G. 700; 6 Scott N. R. 607.

(s) *Mills v. Spencer*, Holt's C. 513.

(t) *Ib.* see *R. v. Burdett*, 4 B. & A. 717.

(u) *Mullett v. Hulton*, 4 Esp. C. 248.

(x) *Wyatt v. Gore*, 1 Holt's C. 303.

(y) 4 Esp. 248.

luded to (the plaintiff) ; otherwise it is not probable that Mr. Salter would introduce an acknowledged "felon, debauchee, and seducer, into the neighborhood of Angel Row." [*99]

Erskine, for the defendant, contended that he was at liberty to go into evidence that the plaintiff had been, in fact, a seducer, not as an answer to the action, but in mitigation of damages. He admitted, that not having pleaded the truth of the words, he could not prevent a verdict from passing against the defendant ; but that, having referred to newspaper authority for the words used in the letter, and not having given them as his own or from his own knowledge, the defendant should be at liberty to give the fact in evidence as coming from another source, to which he referred in his letter ; and as the slander did not proceed from him, it would go in mitigation of damages.

Lord Ellenborough, C. J. said, that as the pleadings stood on the record, the evidence offered was inadmissible as an answer to the action. The libel itself was proved, and there was no justification that entitled the defendant to a verdict ; but he added, that as the words referred to a newspaper, and were so written as a quotation from a newspaper, if the newspaper could be produced, he would admit it as evidence, as having caused the defendant to adopt what he had written in the letter, he having so referred to it [*a a*] [1].

[*a a*] So when the libel purported to be a report of a coroner's inquest, Lord C. J. ABBOTT held that what really passed at the taking of the inquest was evidence under the general issue *in mitigation of damages*. Being short of a justification, it is, said the C. J. upon the general principle admissible as governing the damages. *East v. Chapman*, 1 Moody & Malkin 46. So it was held that the defendant may show in mitigation that he copied the libellous paragraph from a public newspaper, but not that many other journals published the same statement. *Saunders v. Mills*, 6 Bingh. 213.

[1] Although the proof adduced by a defendant in justification of a charge of forgery falls short of establishing the special plea, it may be taken into consideration in mitigation of damages. Per Tindal, C. J. in *Chalmers v. Shackell*, 6 Carr. & Payne 475. In an action for a libel purporting to be a report of what occurred before commissioners of inquiry respecting corporations, it was held that the defendant could not give evidence of the accuracy of the report as a matter of *justification*, but that he might give such evidence in *mitigation of damages*. *Charlton v. Walton*, 6 Carr. & Payne 385.

It is no defence to shew that the plaintiff has been in the habit of libelling the defendant, but it is evidence, it has been

In *Morris v. Duane*, 1 Binney 90, *n.* the defendant was allowed to give in evidence, *in mitigation of damages*, a paper containing the libellous charge, which had been in the possession of a preceding editor, to whose establishment he had succeeded, for the purpose of showing that the defendant had not devised the slander. This decision was approved in *Coleman v. Southwick*, 9 Johns. R. 49, where C. J. KENT conceded that evidence that the defendant had been told by a third person, that what was alleged to be libellous had appeared in a public newspaper, would have been admissible had it been offered to be proved by the person giving the information, and this although a plea of *justification* had been interposed. So in *Gilman v. Lowell*, 8 Wendell 573, the defendant had spoken slanderous words of the plaintiff, when no occasion which the law justifies authorized him to speak ; but still he had cause to believe that what he uttered was the truth, and it was held that he should have been permitted to show *the facts and circumstances of the case*, in mitigation of damages. The plaintiff, against whom a judgment had been rendered in a justice's court, to prevent the issuing of an execution, had made oath that he was a freeholder, and that the deed of his property was duly recorded. The defendant, on diligent search at the clerk's office, not finding the deed on record, charged the plaintiff with false swearing. The deed was in fact recorded, but the names of the parties had not been entered in the *index*, in consequence of which, the record of the deed was not found at the time of the search. On the trial, the defendant offered to prove the above facts *in mitigation of damages*, but the judge refused to receive the evidence, and the plaintiff obtained a verdict for \$250. A new trial was granted, on the ground that the evidence ought to have been received in mitigation of damages. C. J. SAVAGE, who pronounced the judgment of the court, manifestly was inclined to go farther. The facts, he observed, go far to diminish the quantum of malice ; perhaps they show as far as can be done the *absence of malice* ; but all that was done was to direct the evidence to be received in mitigation.

There is one other ground of *mitigation* to which it may be well to advert. *It seems* that an admission by the defendant when interposing his plea that at the time of making the slanderous charge, he acted under a *mistake* of facts, would be available in mitigation of damages. See the language of the court in *Larned v. Buffinton*, 3 Mass. R. 546, as qualified in *Alderman v. French*, 1 Pick. 19. See also what was said by C. J. Savage in *Mapes v Weeks*, 4 Wendell 663, and the intimation of Nelson, C. J. in *Hotchkiss v. Oliphant*, 2 Hill, 515, that a withdrawal or recantation of the charges, by way of atonement, would be admissible in evidence in mitigation of damages. In Starkie's Ev. Part IV., p. 882, it is said that a defendant *indicted* for publishing a libel was permitted to prove, with a view to the *mitigation* of punishment, that he stopped the sale of the publication.

*said, in mitigation of damages (*z*). The latter, how- [*100]
 ever, of these positions is too large, and it seems that, at
 most, the defendant cannot be allowed to do more than prove the
 publication of libels by the plaintiff, which are connected with the
 libel, which is the subject of the action (*a*). As where such previ-
 ous libels constitute the provocation to the principal libel (*b*) [1].

As the defendant, when he insists upon the truth of the imputa-
 tion, must plead it specially, the proof must of course depend in a
 great measure upon the allegations upon the record; there seems
 to be little if any difference between the evidence in proof of a spe-
 cific charge, thus involved in a civil proceeding, and the evidence
 which is essential to support an indictment containing a
 *similar charge (*c*) [1]. It may indeed happen, that [*101]
 more precise evidence may be necessary to support such
 a justification than would be sufficient to sustain an indictment, for
 the proof, in the former case, is governed by the allegations in the
 plea, and allegations in a plea may frequently require precise proof,
 though they would not have done so in an indictment. For instance,
 if the slander consist in charging the plaintiff with having stolen
sovereigns in the plural, the plea must necessarily charge him in the
 plural also, and the defendant would fail in his justification if
 he could prove no more than the stealing of one; but on the trial of
 an indictment for larceny, the variance would be wholly immaterial.

It has been seen that, though the slander be general, the plea of
 justification must be particular (*d*). But should the plaintiff, in-

(*z*) *Finnerty v. Tipper*, 2 Camp. 76. See *Pasquin's case* ib. and *Tabart v. Tipper*, 1 Camp. 380.

(*a*) *May v. Brown*, 3 B. & C. 113, general evidence that the plaintiff has
 been in the habit of libelling the defendant is inadmissible. *Finnerty v. Tipper*,
 2 Camp. 76. *Wakeley v. Johnson*, 1 R. & M. 422.

(*b*) Ib. It was doubted in that case, by Abbott, L. C. J., whether general
 evidence would be admissible to prove the fact; it seems, however, to be clear
 in principle, that the libels themselves ought to be strictly proved.

[1] See also *Watts v. Frazer*, 7 Adolph. & Ellis 223; 2 Scott's Exch. R.
 642: *Beardsley v. Maynard*, 4 Wendell 336 and 7 Id. 560, S. C. in error; and
Gould v. Weed, 12 Wendell 12. (c) *Cooke v. Field*, 3 Esp. C. 233.

(*d*) *Supra* vol. I. 477.

[1] Same doctrine *Woodbeck v. Keller*, 6 Cowen 118.

stead of demurring to a plea for generality, take issue upon it, the defendant will still be bound to prove the slander or libel as stated in the declaration with all its circumstances of exaggeration (*e*); even although the plea merely state that the matters alleged in the

supposed libel are true in substance and effect (*f*);
 [*102] where a libel charged the plaintiff *with having knocked out the eye of a horse and other acts of cruelty, and the defendant pleaded that the matters contained in the alleged libel were true in substance and in fact, the jury having found that it was true in all particulars, except that the eye was not knocked out, the court held that the plaintiff was entitled to a verdict on that plea (*g*). But it would not be necessary in such case to prove circumstances which were not ingredients in the slanderous charge (*h*).

Where words, not contained in the declaration, are given in evidence in order to prove malice, the defendant may, under the general issue, prove the truth of those words (*i*).

The acquittal of the plaintiff, on an indictment charging him with the same offence as is specified in the plea, does not preclude the defendant from proving the truth of the charge (*k*), nor, indeed, does it seem to be evidence at all.

Evidence of general good character is admissible to rebut the presumption of guilt (*l*). And the plaintiff may adduce
 [*103] general evidence of good *character, before any evidence to the contrary has been adduced on the other side (*m*).

Where the defendant justifies, alleging that he heard the words from another whose name he mentioned when he reported them, the proof depends on the issue taken. Upon issue taken on the general replication de injuria, &c., it lies on the defendant to prove, that he

(*e*) *Weaver v. Lloyd*, 2 B. & C. 678.

(*f*) *Ib.*

(*g*) *Weaver v. Lloyd*, 2 B. & C. 678.

(*h*) *Edwards v. Bell*, 1 Bing. 403. *Supra v. I*, p. 483.

(*i*) *Warne v. Chadwell*, 2 Starkie's C. 457. *Collison v. Loder*, B. N. P. 10.

(*k*) *England v. Bourke*, 3 Esp. C. 80.

(*l*) See Starkie's Law of Evidence, part iii. 365.

(*m*) *King v. Waring*, 5 Esp. C. 13. But there the action was brought by a servant for giving a false character. See ante, p. 60, note (m).

heard the very words spoken by such third person, as alleged in the plea, and that on repeating them he gave up his author ; for the object of the plea is to shew, that the defendant has afforded to the plaintiff a certain cause of action against another. It would not be sufficient under this issue to prove, that the third person spoke the words to the same *effect* with those alleged (*n*) [1.]

In actions for malicious prosecutions and other special actions on the case, where the plaintiff is bound to prove express malice and the want of probable cause, the defendant is at liberty to prove that the fact was true, or give any other evidence to show probable cause under the general issue, without a special justification.

For this is merely to repel the proof which is *necessary [*104] to sustain the plaintiff's case ; thus, in an action for slander of title, where the slander consists in alleging that the plaintiff had encroached on his landlord's land, it was held, that the defendant was at liberty to prove that encroachments had in fact been made (*o*).

(*n*) See Lord Northampton's case, 12 Rep. 202. Crawford v. Middleton, 1 Lev. 82. Maitland v. Golding, 2 East. 425. Woolnoth v. Meadows, 5 East. 463.

(*o*) Watson v. Reynolds, 1 M. & M. 1, and see Hargreave v. Le Breton, 4 Burr 2422. Smith v. Spooner, 3 Taunt. 246. Pitt v. Donovan, 1 M. & S. 639. Supra vol. I. 320.

[1] See Vol. I. p. 320, n. [1].

CHAPTER III.

PROCEEDINGS AFTER VERDICT.

[*105] *WHERE the situation in which the defendant was acting at the time of speaking the words, or publishing the libel, was such as to rebut the implication of malice, and no express malice was proved, the court will, after a verdict for the *plaintiff*, grant a new trial (*a*); and this, even though the defendant knew that what he said was not strictly true, provided the variation from the truth be immaterial to the interest stated to have been affected (*b*). But where the false assertion of the defendant is material, no new trial will be granted, though the defendant had an interest in the subject matter affected (*c*).

Where the damages are so outrageous as to induce a strong presumption of partiality in the jury, a new trial will be granted in an action for slander, as well as in other cases, though in
[*106] such an action *the amount of the loss sustained from the injurious act depends upon circumstances of all others the most appropriate for the calculation and assessment of a jury [1].

(*a*) See the observations of the Court in *Bromage v. Prosser*, 4 B. & C. 247.

(*b*) 4 Burr. 2422.

(*c*) See *Smith v. Spooner*, vol. i. p. 317.

[1] In *Coleman v. Southwick*, 9 Johns. R. 51, Chief Justice KENT, in an action for libel said, "The question of damages was within the proper and peculiar province of the jury. It rested in their sound discretion under all the

In the case of *Lord Townsend v. Dr. Hughes* (*d*), which was an action for scandalum magnatum, the words were, "He is an unworthy man, and acts against law and reason." The jury found a verdict for the plaintiff with £4000 damages. A new trial was moved for on these grounds :

1. Because the witnesses who proved the words were not persons of credit, and that, at the time when they were alleged to be spoken, many clergymen were in company with the defendant, and heard no such words spoken.

2dly. Because one of the jury confessed that they gave such great damages to the plaintiff, not that he was damaged so much, but that he might have the greater opportunity to show himself noble in the resisting of them.

3dly. (Which was the principal reason,) because they were excessive.

North, C. J. and Wyndham and Scroggs, Justices, were of opinion, that no new trial ought to be granted, that in a civil action, where the words themselves are actionable, without an averment of special damage, the jury ought to take "into [*107] consideration the whole of the damage which the party might sustain, since he could not bring a fresh action ; that it was impossible for the court to tell what value to set upon the honour of the plaintiff ; that the jury were, by law, judges of the damages ; and that it would be very inconvenient to examine upon what account they gave their verdict.

Atkins, J. dissented from his brethren, conceiving that the court ought to compare the words with the damages, and to consider

(*d*) 2 Mod. 150.

circumstances of the case, and unless the damages are so outrageous as to strike every one with the enormity and injustice of them, and so as to induce the court to believe that the jury must have acted from prejudice, partiality or corruption, we cannot consistently with the precedents, interfere with the verdict. It is not enough to say that in the opinion of the court the damages are too high, and that we would have given much less. It is the judgment of the jury and not the judgment of the court which is to assess the damages in actions for personal torts and injuries. See also *Southwick v. Stevens*, 10 Johns. R. 413 ; *Coffin v. Coffin*, 4 Mass. R. 1 ; *Neal v. Lewis*, 2 Bay's R. 204.

whether they bore any proportion. He also cited the case of *Gunston v. Wood*, where the plaintiff, in an action on the case for calling him a bankrupt, recovered £1500 damages; and the court granted a new trial, because the damages were excessive.

In the same case it was said by Scroggs, J. that had the jury given but one penny damages, the plaintiff could not have obtained a new trial in hopes to increase them.

When the plaintiff's title to recover does not appear perfect upon the face of the record, the defendant may take his objection, either by moving in arrest of judgment within the usual time, or by bringing a writ of error.

It has already been seen what are the rules to be observed in the construction of the defendant's expressions; that they are to be taken according to their plain and obvious meaning, and [*108] in the *sense in which the hearers or readers understood them.

After a verdict for the plaintiff, by which the defendant's act, meaning, and intention, have been ascertained to correspond with the statement upon the record, the courts will not listen to trivial exceptions, but require the party objecting to point out (e) a substantial objection upon the face of the proceedings.

And, in general, where words may be taken in a double sense, the court, after a verdict, will always construe them in that sense which may support the verdict (f).

Where there are several counts in the declaration, and entire damages are given, if one count be defective, judgment must be arrested for the whole, since it is impossible for the court to apportion the damages, and to say what abatement ought to be made in respect of the vicious count (g) [1].

(e) See the opinions of Lord Ellenborough, C. J.; Le Blanc, J.; Lord Mansfield, C. J.; Parker, C. J.; Lord Holt, C. J.; Pratt, J.; Buller, J.; and De Grey, C. J. as cited above, vol. I. p. 64, &c.

(f) 8 Mod. 240.

(g) *Holt v. Scholefield*, 6 T. R. 694.

[1] The law is held otherwise in *New-York* where, if the judge certifies that the evidence applied only to the good counts, the plaintiff may, on payment of costs, enter judgment, *Stafford v. Green*, 1 Johns. R. 505; and even where, the judge certifies that the evidence applied as well to the good as to the defective

And the same rule holds in case one count in the declaration contain words averred to have been spoken at different times, some of which are not actionable. As, if at one time the defendant call "the plaintiff "traitor;" and at another time "ar- [*109] rant knave and cozeners;" and the plaintiff allege (*h*) the words to have been spoken at different times, as several causes of action, if the jury assess the damages generally, judgment will be arrested.

But if actionable words be averred to have been spoken at the same time with others not actionable, the latter are considered (*i*) as laid, merely in aggravation. If the declaration consist of several counts, in one of which the words are not actionable, and no special damage be averred, or, supposing it to be averred, the finding of the jury as to the special damage be for the defendant, and as to the rest generally for the plaintiff, the judgment would be erroneous, and might be avoided by motion, or reversed by writ of error (*k*).

Where, therefore, there is any doubt as to the validity of any one count, (*l*), it is a matter of prudence to have the damages assessed severally, or to take a verdict upon the other counts only. In (*m*) *Rich v. Holt*, the words laid down as spoken of the plaintiff at one time were, "You *are a paltry lawyer, [*110] and use to play on both hands;" at another, "He is a fur-

(*h*) Cro. Eliz. 329. Cro. Car. 236, 237, 238. 2 Wils 185.

(*i*) 3 Wils 185. Lloyd v. Morris, Willes Rep 443. Roll. Ab. 576. Moor 142, 708. Cro; Eliz. 328. 788. 1 Buls. 37.

(*k*) See the cases, 2 Will. Saund. 171. *d*.

(*l*) Burnet v. Wells, 12 Mod. 420.

(*m*) Cro. J. 267.

counts, the judgment will not be arrested, but the verdict will be amended so as to apply it to the good counts. In this the court here not only concurred with Lord Mansfield in his condemnation of the old rule, as will be seen in *Grant v. Astle*, Dougl. 729, but went further and refused to be bound by it. See *Union Turnpike Co. v. Jenkins*, 1 Caines 392; *Cooper v. Bissell*, 15 Johns. R. 318; *Sayre v. Jewett*, 12 Wendell 135. The same rule prevails in SOUTH CAROLINA, where the court say that they do not concur with the King's Bench of England on this subject, *Neal v. Lewis*, 2 Bay 201, and *Hogg v. Wilson*, 1 Nott and McCord 216. So in PENNSYLVANIA, the court directs the verdict to be entered upon the good counts, *Kennedy v. Lowry*, 1 Binney 397; but this cannot be done on a writ of error; *Shafer v. Kintzer*, 1 Binney 537; *Cooper v. Bissell*, 15 Johns. R. 318. See note [1] p. 112, *infra*.

therer and maintainer of felonies." The defendant as to all the words, except those in italics, pleaded not guilty, and as to those a justification. The plaintiff replied *de injuriâ propria*, &c. The jury, upon the first issue, found the whole of the words, and assessed damages for the whole ; they likewise found the second issue for the plaintiff, assessing separate damages. The court, on motion in arrest of judgment, decided that the words, " You are a paltry lawyer," were not actionable, but held that the plaintiff was entitled to judgment on the first issue. It should seem, however, that the plaintiff was not entitled to judgment under the first assessment, supposing the decision to have been correct, that the words, " You are a paltry lawyer," were not actionable.

For the words to be considered under the first issue of not guilty, were the two sets, " You are a paltry lawyer," and " He is a furtherer and maintainer of felonies," the words in italics not coming under the consideration of the jury, since they were confessed ; the damages under the first assessment were, therefore, partly given for the words, " You are a paltry lawyer," which were held not actionable.

It is said to be the practice in the Court of Common [*111] Pleas, to award a *venire de novo* where judgment is arrested in such case, upon payment of costs, in order that the plaintiff may sever his damages (*n*). But in the case of *Holt v. Scholefield* (*o*), in the King's Bench, a *venire de novo* was refused.

In the case of *Beever v. Hides* (*p*), Bathurst, Justice, expressed an opinion, that where the words in one count were not actionable, yet that the *postea* might be amended, and a verdict as to those words entered for the defendant, upon the Judge's certifying that no evidence was given of them at the trial.

But Lord Camden said it would be very dangerous, after a verdict of twelve men recorded by the Court, to refer to the Judge's

(*n*) 2 Will. Saund. 171 *d*. Barnes 478, 480.

(*o*) 6 T. R. 61. Sed vid. *Eddows v. Hopkins*, Doug. 376.

(*p*) 2 Wils. 300.

notes in order to alter it, and he thought there was no precedent of such a case, and that the verdict could not be varied.

The general practice however is, where general damages have been given, and it appears that the plaintiff is entitled to recover upon one count, though not upon others, either to amend the *postea*, which is done where it clearly appears that no evidence was given on the defective *counts (*q*), or by awarding [*112] *a v. f. de novo*, where such evidence has been given, in order that the plaintiff may ascertain to what damages he is entitled for so much of his cause of complaint as will support damages. It does not distinctly appear, upon what principle actions for slander form an exception to the general rule [1].

(*q*) This is now the ordinary practice, and it is done by the judge who tried the cause upon summons at chambers.

[1] See *Hopkins v. Beedle*, 1 Caines 347; *Lyle v. Clason*, Id. 583; *Livingston v. Rogers*, Id. 587.

CHAPTER IV.

OF COSTS.

[*113] *By the 21 Jac. 1. c. 16, it is enacted, that “in all actions upon the case for slanderous words, to be sued or prosecuted in any of the courts of record at Westminster, or in any court whatsoever, that hath power to hold plea of the same ; if the jury, upon the trial of the issue in such action, or the jury that shall inquire of the damages, do find or assess the damages under forty shillings, then the plaintiff or plaintiffs in such action shall have and recover only so much costs as the damages so given or assessed amount unto, without any further increase of the same ; any law, statute, or usage, to the contrary notwithstanding.” [1]

This statute, it has been held, does not extend to actions of scandalum magnatum, nor to those where the special damage is the gist of the action, as in case of slander of title (*a*), nor to actions for libel (*b*).

[*114] *But where the words are in themselves actionable, the case is within the statute, though special damage be averred ; for the plaintiff is at all events entitled to a verdict for

(*a*) 2 Bl. 1062. 2 Ld. Raym. 1588. Prac. Reg. 111. Cro. Car. 140. Jon. 196. 2 Ld. Ray. 931. 1 Salk. 206. 7 Mod. 129. Willes 438. Barnes 132. 2 H. B. 531. 3 Burr. 1688. 1 Str. 645.

(*b*) Hall v. Warner, T. 24 G. 3. Tidd. 861. Sed vide note [1] supra.

[1] In New-York, in an action for slanderous words or for a libel, brought in the Supreme Court, unless the plaintiff obtained a verdict for a sum exceeding fifty dollars, he recovers no more costs than damages, 2 R. S 509, § 6.

the actionable words, without proving the special damage; and if he were in such case entitled to costs, where the damages were under forty shillings, the statute might in all cases be evaded by a suggestion of special damage. This construction is, however, not free from inconvenience; since where special damage has actually accrued, the circumstances of the words being in themselves actionable, may operate to the plaintiff's disadvantage, and he may be placed in a worse situation, by that very presumption of law which was intended for his advantage.

And where it clearly appears, as by a special verdict and separate assessment, that the special damage was actually considered by the jury, it seems reasonable that the plaintiff should have full costs, though the damages do not reach the statutable limit (*c*).

Where the words are actionable, and other matter likewise actionable is stated as a distinct injury, and not as a mere consequence of the words, the plaintiff is entitled to full costs; as *where the declaration, after stating the words imputing [*115] felony, averred that the defendant procured the plaintiff to be imprisoned (*d*).

Where there are different counts in the declaration, some containing words not actionable, and others containing actionable ones, and special damages be laid referring to all the counts, then the plaintiff will, under a general verdict, be entitled to full costs. For some part of the damages assessed must have been given in respect to the consequential damage (*e*).

The statute extends to damages found under a writ of inquiry (*f*).

It has been held that the statute extends to inferior courts, which hold pleas to a less amount than forty shillings only (*g*). But by the st. 58 G. III. c. 30, s. 2, in all actions for slanderous words, in any court which hath not jurisdiction to hold plea to the amount of forty shillings in such suits, if the jury assess the damages under

(*c*) 1 Vent. 93. 1 Mod. 31. 2 Keb. 589.

(*d*) Str. 645. Ld. Ray. 1568. Cro. Car. 163. Cro. Car. 307.

(*e*) 2 H. B. 531.

(*f*) 2 Str. 934

(*g*) Tidd's Prac. 975, 7th ed. 1 Ld. Ray. 181. Hull. on Costs, 38.

thirty shillings, the plaintiff shall recover only so much costs as the damages so given or assessed shall amount to, without further increase.

The 22d and 23d C. 2, c. 9, is very general in its [*116] terms, which comprehend "all personal actions." *By this statute it is enacted, that in such actions, wherein the judge at the trial of the cause shall not find and certify under his hand, upon the back of the record, that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the declaration was chiefly in question, the plaintiff in case the jury shall find the damages to be under the value of forty shillings, shall not recover more costs than damages. At first it seems, that the statute was held to extend to all personal actions (*h*) ; but it appears to be now settled that it is confined to actions of assault and battery, and for local trespasses, wherein it may be possible for the Judge to certify, that the freehold or title to the land was chiefly in question (*h*).

This statute, therefore, does not affect the present class of actions.

And since the case of slander is not considered to be within the latter statute, a justification does not entitle the plaintiff to full costs, where the damages are below forty shillings (*i*).

(*h*) 2 Keb. 849. 3 Keb. 121, 247.

(*h*) See Tidd's Prac. (4 Edn.) 861 where the authorities on the subject are collected.

(*i*) *Halford v. Smith*, 4 East. 567. *Barnes* 128. 2 Wils. 158.

CHAPTER V.

OF THE WRIT OF PROHIBITION.

*A PROHIBITION to the Ecclesiastical Court is grounded either upon a defect in their jurisdiction or upon some irregularity in the course of their proceedings. [*117]

The power of these courts, in cases of defamation, was expressly recognized by 13 E. 1, st. 4. "In cause of defamation, it hath been granted already, that it shall be tried in a Spiritual Court, when *money is not demanded*, but a thing done for punishment of sin; in which case the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition."

Whence it appears that these courts, before the passing of the statute, had the same jurisdiction; and also that the extent of the jurisdiction was to deal out punishment *pro salute animæ* (a) and not to award any temporal compensation in the way of damages for loss of character (b). And the latter position appears still more clearly *from the statute of Articuli Cleri (c); [*118] which enacts, that "In defamations, prelates shall *correct*, the king's prohibition notwithstanding; first enjoining a penance corporal, which, if the offender will redeem, the prelate may freely receive the money, though the king's prohibition be showed."

Under these statutes it has been held, that no suit is maintainable in the Ecclesiastical Courts for any slander (d) not of spiritual

(a) 2 Inst. 492.

(b) Ib.

(c) 9 Edw. 2, c. 4.

(d) 2 Burn. Ecc. L. 120.

Ld. Ray. 212, 397.

God. 517. 2 Salk. 692.

11 Mod. 112.

cognizance. So that an imputation of *perjury* is not a ground for proceeding in the Spiritual Court.

In the instance cited, the party has his remedy by action at Common Law; but provided the slander do not impute any offence cognizable by the Spiritual Court, no punishment can be inflicted for it by such court, though the slander should not be a ground of action at Common Law (*e*). Thus a suit was instituted in the Spiritual Court for calling the plaintiff a false knave, and a prohibition was granted. And it was said (*f*), that though these words do not

imply any offence of which the temporal law takes cognizance, yet being also not of spiritual cognizance, *the Temporal Courts will grant a prohibition that the Ecclesiastical Courts (*g*) may not exceed their jurisdiction.

And the same rule holds though the words be spoken of an ecclesiastical person. The words spoken of a parson were, "He (*h*) has no sense; he is a dunce or blockhead, and deserves to have his gown stripped over his ears." And it was held that the defendant was not punishable in the Spiritual Court; for a parson is not punishable in that court for being a knave or a blockhead more than any other man; and it was said, that if the parson should be deprived for want of learning, he must bring his action at Common Law (*i*).

So it has been held that to call a dean "a knave" was not suable in the Spiritual Court.

But where words (*k*) spoken of a parson impute that which, if true, would subject him to censure in the Ecclesiastical Court, he is entitled to sue there.

Where words of spiritual cognizance are coupled with terms of abuse which are not in themselves actionable in the temporal courts, no prohibition will be granted (*l*); so *that no prohibition lies in a suit for the words, "he is a cuckoldly knave (*m*);" and the rule is the same though it should be

(*e*) 2 Ins. 493.

(*f*) Ibid.

(*g*) 2 Ins. 695.

(*h*) *Coxeter v. Parsons*, Salk. 692.

(*i*) Holt. R. 593. *Nelson v. Hawkins*, Dean of Chichester.

(*k*) *Clark v. Price*, 11 Mod. 208.

(*l*) 2 Salk. 692.

(*m*) *Gobbet's case*, Cro. Car. 339. Golds. 172.

suggested that the words were spoken through heat and passion (*n*).

Where the words themselves are of mere spiritual cognizance, but special damage ensues, for which an action is brought in a temporal court, it seems that no prohibition is grantable.

In the case of *Evans v. Brown* (*o*), where the words were of mere spiritual cognizance, a prohibition was moved for upon a suggestion that the plaintiff below had brought an action at law for the words, grounded upon special damage sustained by reason of the defendant's speaking them. It was contended, that this was like the case where one calls a woman a whore and thief: in that case she shall not have an action in the Ecclesiastical Court for the words, though she might for the word whore; because it being joined with the word thief, an action lies at Common Law for the words. That in such case, the words could not be split, and an action brought at law for the word thief, and a suit in the Ecclesiastical Court for the word whore; so that here, though the words are properly suable for in the Ecclesiastical Court, yet a special [*121] damage attending the speaking of them, by which means an action lies at Common Law for the words, they shall not proceed for the speaking in the Ecclesiastical Court. But the court refused to grant a prohibition.

But it seems that in general, the Spiritual Courts have not, in case of defamation, any concurrent jurisdiction with the courts of Common Law; so that if the same words impute a spiritual and temporal offence, the jurisdiction of the former court ceases. Hollingshead prayed a prohibition to stay a suit in the Spiritual Court for defamation. The words were, "Thou art a bawd, and I will prove thee a bawd;" and because these words were properly determinable in the Spiritual Court, and no action lies for them at Common Law, the prohibition was denied. But (*p*) it was held, that for saying, "Thou keepest a house of bawdry," this being matter determinable at the Common Law by indictment, suit shall not lie in the Spiritual Court.

If a man who has lands by descent sue in the Spiritual Court for

(*n*) *Ld. Ray.* 1136.

(*o*) *Ld. Ray.* 1101.

(*p*) *Cro. Car.* 229. *Str.* 1100. *Cro. Car.* 329.

words of bastardy, a prohibition lies ; for the words tend to the temporal (*q*) disinheritance of the plaintiff.

[*122] *But it seems that the mother would, in such case, be entitled to sue in the Spiritual Court, for the imputation upon her own chastity contained in such a charge of bastardy ; since, with respect to herself, the slander is of mere spiritual cognizance ; and even where the mother and son jointly preferred their libel for such words, a prohibition was denied (*r*).

There seems to be a stronger reason why a man should not sue for words of bastardy than the one assigned in Rolle, namely, that he is not punishable for being a bastard.

Where the same words imputed incontinency, and an infection with the venereal disease to the plaintiff, who sued in the Spiritual Court, a prohibition was granted (*s*) : although the first words were of ecclesiastical cognizance.

So where words of (*t*) incontinency were imputed at the same time with others of felony, a prohibition was moved for and granted for the whole.

*If part of the words be actionable, it seems that a prohibition will be granted for the whole, though the others charge a spiritual offence. As where the defendant said, " You are a whore and thief (*u*)."*

[*123] *Where words are of temporal cognizance from the custom of a particular place, a prohibition will be granted. As where words of incontinence are imputed to a woman in London, no suit is maintainable in the Spiritual Court (*x*). If it appear, however, upon suggestion supported by affidavit, or upon the face of the libel itself, that the parties did not live within the scope of the local jurisdiction, no prohibition will be allowed.

Thus, in the case of *W. Johnson v. Bewick* (*y*) the words were, " Though art a whore," and the custom of London was suggested ;

(*q*) 2 Roll. Ab. 292. Qu. et vid. vol. I. Cap. 4. .

(*r*) Ld. Ray. 1287. 11 Mod. 117.

(*s*) Ld. Ray. 446.

(*t*) Legate v. Wright, H. 10 G. 2.

(*u*) 2 Rol. 297. 1 Sid 404. 3 Mod. 74.

(*x*) Ld. Ray. 711. Str. 188.

(*y*) Ld. Ray. 711.

but it appeared on the face of the suggestion that neither of the parties lived within the jurisdiction of London. It was urged, that it would be hard to deprive the defendant of the power of punishing the plaintiff, for having spoken those malicious and defamatory words in a court where she may proceed, to drive her to another court where she cannot proceed, the plaintiff living out of the jurisdiction of the court. And of that opinion was the whole court; and Holt, C. J. said, that if in such case a prohibition were granted, it would give license to all the market-women, when they were in London, to defame their neighbors, without fear of punishment.

Where a prohibition is prayed, grounded upon a supposed want of jurisdiction in the Spiritual Court, the [*124] defect, if it be not apparent upon the face of the proceedings, must be verified by affidavit (z).

In the case of *Argyle v. Hunt* (a), a prohibition was moved for on the ground of a defect of jurisdiction appearing on the face of the libel, where it was stated, that the words, which were of incontinency, had been spoken in London. But the court said that they could not judicially take notice of the custom, without an affidavit. But in the case of *Power v. Shaw* (b), a rule to show cause was granted why prohibition should not go for calling a woman strumpet, in Bristol, though there was no affidavit of the custom.

It seems, generally, that any (c) words from which the intention to impute whoredom can be collected, will be a good ground for prohibition.

The Spiritual Court is bound to allow the defendant the advantage of any justification which would have availed him at Common Law (d).

The plaintiff proceeded in the Spiritual Court for the [*125] words, "You had a bastard (e)." The defendant pleaded that the plaintiff had been sentenced for this cause of hav-

(z) M. 12. G. II. *Hinds v. Thompson.* *Driver v. Driver*, Hill. 12. G. II. And. 304.

(a) Str. 187.

(b) 1 Wils. 62.

(c) Sir. 471.

(d) Com. dig. tit. Prohibition, G. 14.

(e) Cro. J. 625. 2 Rol. Rep. 82.

ing a bastard, and ordered to keep the bastard, at the sessions, at Norwich. Notwithstanding this, the court proceeded, and the defendant, in the Spiritual Court, moved for a prohibition, suggesting the special matter, to which the other party demurred. It was adjudged that the prohibition should stand : for, being sentenced to be the reputed father by the Justices of the Peace, which is by the authority of the Statute Law, that sentence could not be impeached in the Spiritual Court, or elsewhere ; and all are concluded to say the contrary until it be reversed.

By the 1st Edw. III. st. 2. c. 11, “ No suit shall be made in the Spiritual Court against indictors. The Commons do grievously complain, that when divers persons, as well clerks as lay people, have been indicted before sheriffs in their turns, and after the inquest procured be delivered before the Justices, after their deliverance they do sue in the Spiritual Court against such indictors, surmising against them that they have defamed them, to the great damage of the indictors, wherefore many people of the shire be in fear to indict such offenders ; the king will, that in such
[*126] *case, every man that feeleth himself aggrieved thereby, shall have a prohibition framed in the Chancery upon his case.”

Though the statute in terms comprehends indictments before sheriffs in their turns only ; it seems that it extends to indictments in all other courts, and to all witnesses and others who have affairs in temporal courts (*f*).

By the st. 27 G. III. c. 44, no suit for defamatory words shall be brought in any of the Ecclesiastical Courts, unless the same shall be commenced within six calendar months from the time when such words shall have been uttered.

The distinction as to the time of moving in prohibition is, that where the defect alleged is extrinsic of the libel itself, the party must apply before sentence in the Spiritual Court ; for where the Spiritual Court has an original judisdiction which is to be taken away upon account of some matter arising in the suit there, after sentence the party shall never have a prohibition, because he him-

self hath acquiesced in their manner of trial, which is a waiver of the benefit of a Common Law trial. But if the defect of jurisdiction appear upon the libel, the party never comes too late (*g*).

*In the early part of the reign of Queen Anne, a prohibition was moved for to stay a proceeding in the court of the Earl Marshal against the defendant, for having said to the plaintiff, who was a knight, “ You a knight (*h*) ! you are a pitiful fellow, and an inconsiderable fellow,” to the great scandal of gentlemen and of the order of knighthood. From the judgment given by Lord Holt upon this occasion, it appears that a prohibition had been sent to a Court of Honour some years before, (though it had then been contended that under the st. 13 Rich. II. c. 2, the proper mode of resisting any encroachment by such courts, was by a writ from the Privy Council to restrain them ;) since in all cases of encroachments by courts of inferior jurisdiction, the proper remedy is by writ of prohibition.

With respect to the court itself to which the prohibition prayed for was to be sent, it appeared that it had been held before the Constable and Marshal till the 13.h year of H. 8. when the Constable (*i*) was attainted of treason, and the office extinguished ; but that the pleas relating to matters of law had since been held before the Earl Marshal only. But the court were of opinion, that whatever colour there might be to *hold plea of some things [*123] before the Marshal alone, there was no pretence to hold plea (*k*) of words.

(*g*) *Argyle v. Hunt*, Str. 187.

(*h*) *Chambers v. Jennings*, 7 Mod. 125.

(*i*) *Stafford*, duke of Buckingham.

(*k*) Several instances of great oppression, where this court held plea of words are cited in *Hume* and *Ld. Clarendon*.

CHAPTER VI.

PUBLICATIONS AGAINST RELIGION.

[*129] *HAVING thus considered the nature and extent of the civil remedy, in respect of malicious and injurious communications, the subject is next to be regarded in reference to the interests of the public.

It may be asserted generally, that the wilful and unauthorized publication of that which immediately tends to produce mischief and inconvenience to society, is a public offence.

The present branch of the subject may be considered,

1st. In reference to the essentials which constitute the offence.

2ndly. The mode of prosecution and punishment.

First, in reference to the essentials which constitute the offence :

These regard—

1st. The nature, quality, and tendency of the matter published.

2ndly. The act of the party concerned in the publication.

3rdly. His motive and intention.

4thly. Collateral circumstances.

[*130] *First, as to the nature, quality, and tendency of the matter published.

The offence may consist in the tendency of the communication to weaken or dissolve religious or moral restraints, or to alienate mens' minds from the established constitution of the state, or to engender hatred and contempt of the king or his government, or the houses of Parliament, or the administration of public justice, or in general to

produce some particular inconvenience or mischief, or to excite individuals to the commission of breaches of the public peace, or other illegal acts.

Blasphemies against God and religion may be regarded spiritually, as acts of imbecile and impious hostility against the Almighty, or temporally, as they affect the peace and good order of civil society. It is in the latter relation only that such offences are properly cognizable by municipal laws. To attempt to redress or avenge insults to a supreme and omnipotent Creator, would be absurd ; but when it is considered that such impieties not only tend to weaken and undermine the very foundation on which all human laws must rest, and to dissolve those moral and religious obligations, without the aid of which mere positive laws and penal restraints would be inefficacious, but also immediately tend to acts of outrage and violence (*a*)

*being for the most part, gross insults to those who be- [*131]
lieve in the doctrines which are held up to scorn and

(*a*) The following are the remarks of the learned Michaelis, on the question whether blasphemy ought to be punished in the temporal courts—*Michaelis on the Mosac Law*, vol. 4 p. 491 ; Smith's Translation.

With regard, then, to blasphemy, is it irrational, barbarous, and superstitious, that any punishment should be inflicted on the crimes which are usually comprehended under this name? Almost all nations have accounted it just, and some have punished such crimes with extreme severity. At present, however, the objection that *blasphemy injures not God, he being infinitely exalted above it*, is trumpeted abroad with loud approbation. It does not, indeed, appear very striking to me ; and those who make it would seem to have conceived that the intention of punishing blasphemy were to procure safety to God : that, however, could scarcely have been the unanimous idea of so many nations, and these, too, differing so widely in civilization, climate and religion ; for most of them would probably have conceived, that if God wished to avenge this crime, he would take vengeance at his pleasure, and would not want the aid of human laws for this purpose.

On God's account, then, punishments for blasphemies are *not* necessary ; but perhaps they *are* necessary for the sake of our neighbour, who, if he believes in a God, or holds his religion, whether true or false, to be true, always feels himself extremely scandalized by them. Nor is it only blasphemy against the *true* God that ought to be punished, but even that against false gods, supposed saints and fictitious religion, whenever they happen to be the gods, saints, and religion of the people.

*contempt, they necessarily become an important subject
[*132] of municipal coercion and restraint (b).

Putting blasphemy entirely out of the question, has any man a right to call me to my face, on account of my opinions, whether true or false, or, which is the same thing, on account of the philosophy which I adopt, a fool, a profligate, a villain! He may be of a different opinion, and may, if I choose to hear him, give his reasons with great animation, in which case, should a harsh word escape him in the keenness of argument, I am bound to overlook it, because I might myself be guilty of the same fault; but if, without having this apology, he should tell me to my face, *The philosophy which you adopt is nonsense; it is abominable; it is imposture; and its author is a villain and a rogue*—I certainly should not be censurable for repaying such insolence with manual chastisement, if the magistrate would listen to no complaint on account of it. And if the man had treated me with such gross rudeness in the presence of others—of my children, perhaps, or my servants, before whom I should thereby have appeared in a contemptible light, his offence would be so much the greater; I ought to have it in my power to complain of it; and though, instead of doing so, I were to give him a drubbing, I certainly should have the excuse of what is called a *justus dolor* to plead. Again, the offence would be further aggravated, and my right to revenge it the better if he had addressed me in such insolent language in a place where he had no title to be without my permission—for example, in my own house.

Now to the man who from his heart believes his religion, and regards it as the way to eternal bliss, and as the comfort both of life and death, and who, of course, wishes to educate his family in the knowledge and belief of it, nothing can be more offensive than to hear another speaking against it, and employing, not arguments (although even these he might let alone, because every man has a right even to err, without our forcibly interfering to rid him of his errors,) but insolent and contemptuous language, and blaspheming its gods, its prophets, saints, and sacred things. Where the religion in question is only *tolerated* still the state is bound to protect every person who believes it, from such outrages, or it cannot blame him if he has not the patience to bear them. But if it be the established national religion, and of course the person not believing it be only tolerated by the state, and though he enjoys its protection just as if he were in a strange house, such an outrage is excessively gross; and unless we conceive the people so tame as to put up with any affront, and of course likely to play but a very despicable part on the stage of the world, the state has only to choose between the two alternatives, of either punishing the blasphemer itself or else leaving him to the fury of the people. The former is the milder plan, and therefore to be preferred, because the people are apt to gratify their vengeance without sufficient inquiry, and of course it may light upon the innocent.

Nor is this by any means a right which I only claim for the religion which I

*The importance of such restraints is strongly illustrated in the instance of judicial oaths. The foundation of [*123]

hold to be the true one ; I am also bound to admit it when I happen to be among a people from whose religion I dissent ; were I in a Catholic country to deride their saints or insult their religion by my behaviour, were it only by rudely and designedly putting on my hat, where decency would have suggested the taking it off ; or were I in Turkey to blaspheme Mahomet, or in a Heathen city its Gods ;—nothing would be more natural than for the people, instead of suffering it, to avenge the insult in their usual way, that is tumultuously, passionately, and immoderately ; or else the state would, in order to secure me from the effects of their fury, be under the necessity of taking my punishment upon itself, and if it does so, it does a favour both to me and other dissenters from the established religion, because it secures us from still greater evils. Of the mischief that the blasphemer, and still more the scoffer at religion, does in society, if he succeed in making religion really contemptible, I do not think it necessary here to say a word.

To the complete disowner of religion, whether he disbelieve in a God altogether, or but only as concerning himself in human affairs, as punishing sin and ruling the world, and consequently to the blasphemer of the only true God, the state according to the spirit of laws, owes no toleration whatever, because no dependence can be placed on such a person, his oath being a mere nonentity ; nor is he to be trusted farther than he is under inspection. Should he be a malicious rascal, punishments would be insufficient to secure us against his attacks, because the man who has no dread of another world, can hope to escape punishment by suicide. He is therefore a very dangerous member of society. If again the state does not proceed upon this principle, if it tolerates the Atheist and the Infidel, nay, and protects him too, although no dependence can be placed on his doing anything in return for the defence of the country, because he can give himself a dispensation from all oaths, and putting arms into his hands might be hazardous ; still such a man must suspect that he is, as I before expressed it, in a strange house wherein he cannot possibly claim equal rights with others. His oath cannot so much as be valid for a proof in any judicial process. He ought, therefore, to behave as a man in a strange house will naturally do, without insulting by his blasphemies the people who lodge and protect him, and yet get nothing from him in return, or else he cannot think it unjust that he should be punished if he does.

In fact, the doctrine that *blasphemy ought not to be punished*, appears to me to border upon the persecution of religion ; for thus, the infidel would have a right to blaspheme and we should be obliged to bear it. Nay, even scoffing and reviling religion is, likewise, a persecution of it, and one that is felt very sensibly by its friends ; for if I am obliged to let another person insult me to my face, I must consider it as inflicting a deep wound upon my honour.

- [*134] these is as a belief in a superintending *Deity, who watches over the affairs of men, and who will, in a future state administer rewards and punishments with reference to
- [*135] their conduct here. To remove therefore so solemn and weighty an obligation, would be to overthrow, or at least to weaken, that confidence in human veracity which is necessary for the purposes of society, without which no question of property could be decided, and no criminal brought to justice (*c*).
- [*136] *Upon the dangerous temporal consequences likely to proceed from the removal of religious and moral restraints, the punishment for blasphemous, profane, and immoral (*d*) publications is founded, without any view to the spiritual correction or amendment (*e*) of the offender.

Blasphemy against the Almighty by denying his being or providence, contumelious reflections upon the life and character of Jesus Christ (*d*), and in general scoffing, flippant, and indecorous remarks and comments upon the scriptures, are offences at Common Law, for Christianity (*e*), as has frequently been asserted by high authorities, is part of that law. There are also some offences against Christianity in particular, which will be afterwards noticed, as having been defined by certain statutes. The first instance of prosecution for words reflecting on religion occurred in the 15th year of James I.

- [*137] Atwood (*f*) was convicted upon an indictment *before Justices of the Peace for saying “the religion now pro-

(*b*) Offences of this nature, because they tend to subvert all religion and morality, which are the foundation of government, are punishable by the temporal judges with fine and imprisonment. Haw. P. C. B. 1, c. 5.

(*c*) *Utiles esse opiniones has quis negat cum intelligat quam multa firmentur jurejurando; quantæ salutis sint fœderum religiones; quam multos divini supplicii metus a scelere revocârît; quamque sancta sit societas civium inter ipsos Diis immortalibus interpositis tam judicibus tam testibus.* Cic. de LL.

(*d*) 11 Mod. 142. (*e*) 4 Bl. Comm. 59. Fitz. 65. 2 Roll. Ab. 78.

(*d*) Haw. P. C. Book 1, c. 5. 1 Vent. 295. 3 Keb. 607. 4 Comm. 59.

(*e*) 4 Bl. Com. 59. 1 Haw. Pl. Cr. c. 5. 1 Vin. 293. 2 Str. 834. 1 Vent. 293. 11 Mod. 142. 1 Str. 416, 788. Fitz. 65. 2 Roll. Ab. 187. Cro. J. 24, 421. *Infra* 138, 143.

(*f*) Cr. J. 421.

fessed was a new religion within fifty years ; preaching is but prating, and hearing of service more edifying than two hours' preaching." It was assigned, for error, that this was an offence not inquirable upon indictment before Justices of the Peace, but only before the High Commissioners ; and it was referred to the Attorney-General (*g*) to consider thereof, and he certified that it was not inquirable before them, and of that opinion were the whole court.

In the *King v. Taylor* (*h*), the defendant was convicted upon an information for saying that " Jesus Christ was a bastard, a whore-master ; religion was a cheat ; and that he neither feared God, the Devil, nor man." Hale, Chief Baron, observed, that such kind of wicked and blasphemous words were not only an offence against God and religion, but a crime against the laws, state, and government, and therefore punishable in this (*i*) court ; that to say religion is a cheat, is to dissolve all those obligations whereby civil societies are preserved ; and that Christianity is parcel of the laws of England ; and, therefore, to reproach the Christian religion is to speak in subversion of the law [1].

*In the cases of *Clendon* (*k*) and *Hall* (*l*), the defend- [*138]
ants were convicted of having published libellous reflections upon the Trinity, and it does not seem to have been doubted in those cases whether the offence was of a temporal nature.

In the case of the *King v. Woolston* (*m*), the defendant had been convicted of publishing five libels, wherein the miracles of Jesus Christ were turned into ridicule, and his life and conversation exposed and vilified. It was moved in arrest of judgment, that the offence was not punishable in the Temporal Courts. But the court declared they would not suffer it to be debated, whether to write against Christianity in general was not an offence of temporal cognizance. The counsel for the defendant further contended, that the intent of the book was merely to shew that the miracles of Jesus

(*g*) Sir Henry Yelverton.

(*h*) Vent. 293. 3 Keb. Rep. 607. (*i*) i. e. of K. B.

(*l*) 1 Str. 416.

(*m*) Str. 834. Fitzgibb. 64, Barnard.

(*k*) E. T. 10 Ann, cited Str. 789.

[1] BLASPHEMY held to be punishable at Common Law, in *The People v. Ruggles*, 8 Johns. R. 290.

were not to be taken in a literal but in an allegorical sense, and therefore that the book could not be considered as aimed at Christianity in general, but merely as attacking one proof of the divine mission.

But the court said they were of opinion, that the attack-
 [*139] ing Christianity in this way was destroying the *very foundation of it; and that though there were professions in the book that the design of it was to establish Christianity upon a true bottom, by considering these narratives in scripture as emblematical and prophetical, yet that these professions could not be credited, and that the rule is, *allegatio contra factum non est admittenda*.

But the court, in declaring that they would not suffer it to be debated, whether writing against Christianity in general was a temporal offence, desired that it might be noticed that they laid their stress upon the term *general*, and did not intend to include disputes between learned men upon particular controverted points; and Lord Raymond, C. J. in delivering the opinion of the court said, "I would have it taken notice of, that we do not meddle with any differences in opinion, and that we interfere only (*n*) where the very root of Christianity is struck at; and with him agreed the whole court.

An information (*o*) was filed by the Attorney-General (*p*) against Jacob Iive for publishing a profane and blasphemous libel, tending to vilify and subvert the Christian religion, and to blaspheme *our Saviour Jesus Christ, and to cause his divinity to be denied, and to represent him as an impostor, and to scandalize, ridicule, and bring into contempt, his most holy life and doctrine; and also to cause the truth of the Christian religion to be disbelieved and totally rejected, by representing the same as spurious and chimerical, and a piece of forgery and priestcraft.

An information (*q*) was exhibited against one Peter Annett, by the Attorney-General, for a certain malignant, profane, and blasphemous libel, intituled "The Free Inquirer," tending to blaspheme

(*n*) Fitzgibbon 66. (*o*) Hill. Term, 29. G. II. 1756. Dig. L. L. 83.

(*p*) Charles Pratt, Esq. afterwards Chief Justice of the Common Pleas.

(*q*) Mich. 3 Geo. III. 1763. 2 Burn's Ecclesiastical Law, 781.

Almighty God, and to ridicule, traduce, and discredit his Holy Scriptures, particularly the Pentateuch, and to represent, and to cause it to be believed, that the prophet Moses was an imposter, and that the sacred truths and miracles recorded and set forth in the Pentateuch were impositions and false inventions, and thereby to diffuse and propagate irreligious and diabolical opinions in the minds of his Majesty's subjects, and to shake the foundations of the Christian religion, and of the civil and ecclesiastical government established in this kingdom.

Being convicted upon this information, the sentence of the Court of King's Bench was, that *he should suffer one month's imprisonment in Newgate, stand twice in the pillory, once at Charing Cross, and once at the Royal Exchange, and then be confined in Bridewell to hard labour for one year, and to find security for his good behaviour for the remainder of his life. [*141]

An information (r) was exhibited by the Attorney-General (s) against John Wilkes, for publishing an obscene and impious libel, tending to vitiate and corrupt the minds and manners of his Majesty's subjects; to introduce a total contempt of religion, modesty, and virtue; to *blaspheme* Almighty God; and to *ridicule* our Saviour and the Christian religion.

In the *King v. Williams* (t) the defendant was convicted of having published a libel, entitled "Paine's Age of Reason," which denied the authority of the Old and New Testament, asserted that reason was the only rule by which the conduct of men ought to be guided, and ridiculed the prophets, Jesus Christ, his disciples, and the scriptures. Upon being brought up to receive sentence, Mr. Justice Ashurst observed, that such doctrines were an offence, not only against God, but against law and government, from their *direct tendency to dissolve all the bonds and obligations of civil society; and that upon this ground it [*142]

(r) III. 4. G. III.

(s) Sir Flecher Norton.

(t) Before Lord Kenyon, C. J. at the Guildhall, 1797.

was, that the Christian religion constituted part of the law of the land (*u*).

Daniel Isaac Eaton was convicted upon an information [*143] *filed by the Attorney-General (*x*), of having published an impious libel, representing Jesus Christ as an imposter—the Christian religion as a mere fable—and those who believed in it as infidels to God. Upon being brought (*y*) up to receive the judgment of the court, though his counsel addressed the court for the purpose of mitigating the punishment, no exception was taken to the legality or propriety of the conviction.

It appears, therefore, to have been long ago settled, that blasphemy against the Deity in general, or an attack against the Christian religion individually, for the purpose of exposing its doctrines to contempt and ridicule, is indictable and punishable as a temporal offence at Common Law. The same doctrine has been fully recognized in several recent cases (*z*).

(*u*) He observed, that “although the Almighty did not require the aid of human tribunals to vindicate his precepts, it was, nevertheless, fit to show our abhorrence of such wicked doctrines, which were not only an offence against God, but against all law and government, from their direct tendency to dissolve all the bonds and obligations of civil society. It was upon this ground that the Christian religion constituted part of the law of the land. But if the name of our Redeemer was suffered to be traduced, and his holy religion treated with contempt, the solemnity of an oath, on which the due administration of justice depended, would be destroyed, and the law be stripped of one of its principal sanctions—the dread of future punishment. This crime was farther aggravated by the motive in which it was conceived: there could be no temptation, no sudden impulse of passion, to which man was so often exposed by the frailty of his nature; it could have proceeded only from a cool and malignant spirit.” Mr. Justice Ashurst then pronounced the judgment of the court, which was, “that the defendant be imprisoned in the house of correction for one year, there to be kept to hard labour, and that, at the expiration thereof, he shall give security to the amount of £1000 for his good behaviour for the rest of his life.”

Lord Kenyon said, that the sentence was light, very light indeed, considering the nature of his offence, which was horrible to Christian ears: he had known a case of less enormity, where the defendant was sentenced to three years’ imprisonment.

(*x*) Sir Vicary Gibbs, Knt.

(*y*) Easter Term, 52 G. III.

(*z*) *Rex v. Carlile*, 3 B. & A. 161, where the defendant having been convicted of publishing two blasphemous libels, was, in Mich. T. 60 G. III., sen-

With respect to the extent of this offence, and the nature and certainty of the words, it appears, *in the [*144] first place, to be immaterial, whether the publication be oral (*a*) or written; though the committing mischievous matter to print or writing, and thereby affording it a wider circulation, would undoubtedly be considered as an aggravation, and affect the measure of punishment.

Again, it does not, in principle, seem to be material, whether the direct attack is made upon religion in general, or upon some particular proof or evidence in support of it: thus, in Woolston's case, the publication was considered to be illegal, though the immediate and professed object of the writer was to overthrow the evidence of the divine mission supplied by the miracles, and to degrade them into mere emblems and allegory. The court were there of opinion, that a *general and deliberate intention* to subvert Christianity might be evidenced by an attempt to weaken one of the several proofs upon which its credibility rests; and, indeed, it would be inconsistent to inflict penalties for any general attack upon the system of Christianity, and yet to allow its foundations to be gradually sapped and undermined with impunity.

It may be asked, is every publication which *tends to [*145] weaken any particular argument which has been adduced to prove the existence of a superintending Deity, or the truth of Christianity, illegal and indictable? There can be no doubt as to the general right of inquiry and discussion, even upon the most sacred subjects, provided the license be exercised in the spirit of temperance, moderation, and fairness, without any intention to injure or affront (*b*). In the cases cited, the defendants were charged with

tenced to pay a fine of £1500, to be imprisoned for three years, and to find sureties for his good behaviour for the term of his life. Also in the case of *R. v. Waddington*, 1 B. & C. 26 and *R. v. Taylor*, who in Hil. T. 1828, was sentenced to pay a fine, and to suffer one year's imprisonment, for a blasphemous discourse.

(*a*) *The King v. Atwood*, Cro. J. 421. *The King v. Taylor*, 3 Keb. Rep. 607. Vent. 293. *The King v. Taylor*, Hil. T. 1828.

(*b*) See the trial of the publisher of Paine's *Age of Reason*. The learned counsel for the prosecution (Mr. Erskine) observed, " Every man has a right

having exposed Christianity and its doctrines to contempt and ridicule, for the purpose of introducing a *general* disregard of religion. And in *Woolston's* case the court desired it might be particularly noticed, that they laid stress upon the term *general*, and did not intend to include disputes between learned men upon controverted points.

[*146] There are no questions of more intense and *awful interest, than those which concern the relations between the Creator and the beings of his creation ; and though, as a matter of discretion and prudence, it might be better to leave the discussion of such matters to those who from their education and habits, are most likely to form correct conclusions, yet it cannot be doubted that any man has a right, not merely to judge for himself on such subjects, but also legally speaking, to publish his opinions for the benefit of others.

When learned and acute men enter upon these discussions with such laudable motives, their very controversies, even where one of the antagonists must necessarily be mistaken, so far from producing mischief, must in general tend to the advancement of truth, and the establishment of religion on the firmest and most stable foundations. The very absurdity and folly of an ignorant man, who professes to teach and enlighten the rest of mankind, are usually so gross as to render his errors harmless ; but be this as it may, the law interferes not with his blunders so long as they are honest ones. Justly considering, that society are more than compensated for the partial and limited mischiefs which may arise from the mistaken endeavors of honest ignorance, by the splendid advantages which result to religion and to truth from the exertions of free and unfettered minds.

[*147] It is the mischievous *abuse of this state of intellectual liberty which calls for penal censure. The law visits not

to investigate, with reason, controversial points of the Christian religion ; but no man, consistently with a law which only exists under its sanctions, has a right to deny its very existence, and to pour forth such shocking and insulting invectives as the lowest establishments in the gradations of civil authority ought not to be subjected to, and which would soon be borne down by violence and disobedience if they were."

the honest errors, but the malice of mankind. A wilful intention to pervert, insult, and mislead others, by means of licentious and contumelious abuse applied to sacred subjects, or by wilful misrepresentations or artful sophistry, calculated to mislead the ignorant and unwary, is the criterion and test of guilt.

A malicious and mischievous intention, or what is equivalent to such an intention, in law, as well as morals—a state of apathy and indifference to the interests of society is the broad boundary between right and wrong. If it can be collected from the circumstances of the publication, from a display of offensive levity, from contumelious and abusive expressions applied to sacred persons or subjects, that the design of the author was to occasion that mischief to which the matter which he publishes immediately tends, to destroy or even to weaken men's sense of religious or moral obligations, to insult those who believe by casting contumelious abuse and ridicule upon their doctrines, or to bring the established religion and form of worship into disgrace and contempt (*c*), the offence against society is complete.

*The legislature has, nevertheless, deemed it proper to fortify the Common Law restraint by several penal enactments, applicable to particular persons and cases. By statutes [*148] 1 Ed. VI. c. 1, and 1 Eliz. c. 1, s. 14, whoever reviles the sacrament of the Lord's supper shall be punished by fine and imprisonment.

By stat. 1 Eliz. c. 2, if any *minister* shall speak any thing in derogation of the book of Common Prayer, he shall, if not beneficed, be imprisoned one year for the first offence, and for life for the second; and if he be beneficed, he shall for the first offence be imprisoned six months, and forfeit a year's value of his benefice; for the second, he shall be deprived and suffer one year's imprisonment; and for the third, shall in like manner be deprived, and suffer imprisonment for life. And if any person whatsoever shall, in plays,

(*c*) Sir William Blackstone, in his Comment upon the Statutes cited below, observes, "It is clear that no restraint should be laid upon rational and dispassionate discussions of the rectitude and propriety of the established mode of worship, yet contumely and contempt are what no establishment can tolerate." 4 Bl. Com. 51.

songs, or other open words, speak any thing in derogation, depraving or despising of the said book, or shall forcibly prevent the reading of it, or cause any other service to be read in its stead, he shall forfeit for the first offence 100 marks, for the second 400, and for the third, shall forfeit all his goods and chattels, and suffer imprisonment for life.

*By the 13 Eliz. c. 12, a person ecclesiastical, advisedly affirming any doctrine contrary to the articles established at a convocation, holden at London, in the year 1562, is liable to deprivation, if he persist in his error.

By the 3 J. 1, c. 21, whoever shall use the name of the Holy Trinity profanely or jestingly in any stage play, interlude, or show, shall be liable to a penalty of £10.

By stat. 9 and 10 Will. III. c. 32, if any person educated in, or having made profession of the Christian religion, shall by writing, printing, teaching, or advised speaking, deny any one of the persons of the Holy Trinity to be God, or assert or maintain that there are more gods than one, or deny the Christian religion to be true, or the holy scriptures to be of divine authority, he shall, upon the first offence, be rendered incapable to hold any office or place of trust; and for the second, be rendered incapable of bringing any action, being guardian, executor, legatee, or of any legacy or deed of gift, or to bear any civil or military office or benefice ecclesiastical, and shall suffer imprisonment for three years from the time of conviction (*d*).

*By the st. 53 G. III. c. 160, s. 2, the provisions of the last cited act are repealed so far as they relate to persons denying, [*150] as therein mentioned, the Holy Trinity.

An offender against the st. 9 and 10. W. III. c. 32, is still indictable at common law, for a statute inflicting a new punishment does not take away the old one, unless it change the offence or make it of a different nature (*e*).

(*d*). By sec. 2, no person shall be prosecuted under the act for words spoken, unless the information shall be given on oath before one or more justices within four days after such words spoken, and the prosecution shall be within three months after such information.

(*e*) *R. v. Carlile*, 3 B. & A. 161. *R. v. Williams*, Howell's St. Tr. vol. 26, p. 656 2 Str. 884. *Barnard*, K. B. 162. *R. v. Eaton*, 1815. In the case of

*And it seems that the st. 53 G. III. c. 160, s. 2, [*151] does not alter the common law, but only removes the penalties imposed upon persons denying the Trinity by the st. 9 and 10 W. III. c. 22; and therefore contumelious remarks on the character of Jesus Christ, published with intent to impugn the authenticity of the scriptures is still an offence at common law (*f*).

the King *v.* Carlile, 3 B. & A. 161, the defendant having been convicted of a blasphemous libel on an information for an offence at common law, the court held, that the st. 9 & 10 W. III. did not alter the common law offence, but merely gave a cumulative punishment. Best, J. in giving judgment, observed, so far from the statute of William containing provisions so inconsistent with the common law as to operate as a repeal by implication, as far as it applies to the offence of libel, it seems intended to aid the common law. It is called "An act for the more effectual suppression of blasphemy and profaneness." It would ill deserve that name if it abrogated the common law, inasmuch as for the first offence it only operates against those who are in possession of offices or in expectation of them. The rest of the world might with impunity blaspheme God, and profane the ordinances and institutions of religion, if the common law punishment is put an end to. But the legislature in passing this act had not the punishment of blasphemy so much in view, as the protecting the government of the country, by preventing infidels from getting into places of trust. In the age of toleration in which that statute passed, neither churchmen or sectarians wished to protect in their infidelity those who disbelieved the Holy Scriptures; on the contrary, all agreed that as the system of morals which regulated their conduct was built on these scriptures, none were to be trusted with offices who showed they were under no religious responsibility. This act is not confined to those who libel religion, but extends to those who, in the most private intercourse by advised conversation, admit that they disbelieve the scriptures. Both the common law and this statute are necessary, the first to guard the morals of the people, the second for the immediate protection of the government.

The defendant was afterwards for this and another blasphemous libel, sentenced to pay a fine of £1500; to be imprisoned for three years and to find sureties for his good behaviour for the term of his life.

(*f*) *R. v. Waddington*, 1 B. & C. 26. K. B. Mich. Term. 1822.

This was an information by the Attorney-General against the defendant for a blasphemous libel. The effect of the libel set out in the information was to impugn the authenticity of the scriptures, and one part of it stated that Jesus Christ was an impostor, and a murderer in principle, and a fanatic. The defendant was tried at the last Middlesex Sitzings after last Trinity Term and convicted. Before the verdict was pronounced, one of the jurymen asked the Lord

Chief Justice whether a work which denied the divinity of our Saviour was a libel. The Lord Chief Justice answered, that a work speaking of Jesus Christ in the language used in the publication in question, was a libel; Christianity being a part of the law of the land. The defendant in person now moved for a new trial, and urged that the Lord Chief Justice had misdirected the jury, by stating that any publication in which the divinity of Jesus Christ was denied, was an unlawful libel; and he argued that, since the 53 G. III. c. 160, was passed, the denying one of the persons of the Trinity to be God was no offence, and consequently that a publication in support of such a position was not a libel.

Abbott, C. J. I told the jury that any publication in which our Saviour was spoken of in the language used in the publication, for which the defendant was prosecuted, was a libel. I have no doubt whatever, that it is a libel to publish that our Saviour was an impostor and a murderer in principle.

Bayley, J. It appears to me that the direction of my Lord Chief Justice was perfectly right. The 53 G. III. c. 160, removes the penalties imposed by certain statutes referred to in the act, and leaves the common law as it stood before. There cannot be any doubt that a work which does not merely deny the Godhead of Jesus Christ, but which states him to be an impostor and a murderer in principle, was at common law, and still is, a libel.

Holroyd, J. I have no doubt whatever, that any publication in which our Saviour is spoken of in the language used in the work which was the subject of this prosecution, is a libel. The direction of the Lord Chief Justice was therefore right in point of law, and there is no ground for a new trial.

Bast, J. My Lord Chief Justice reports to us that he told the jury that it was an indictable offence to speak of Jesus Christ in the manner he is spoken of in the publication for which this defendant is indicted. It cannot admit of the least doubt that this direction was correct. The 53 G. III. c. 160, has made no alteration in the common law relative to libel. If previous to the passing of that statute it would have been a libel to deny, in any printed work, the divinity of the second person in the Trinity, the same publication would be a libel now. The 53 Geo. III. c. 160, as its title expresses, is an act to relieve persons who impugn the doctrine of the Trinity from certain penalties. If we look at the body of the act to see from what penalties such persons are relieved, we find that they are the penalties from which the 1 W. & M. Sess. 1, c. 18, exempted all Protestant dissenters except such as denied the Trinity; and the penalties or disabilities which the 9 and 10 W. III. imposed on those who denied the Trinity. The 1 W. and M. Sess. 1, c. 18, is, as it has been usually called, An Act of toleration, or one which allows dissenters to worship God in the mode that is agreeable to their religious opinions, and exempts them from punishment for non-attendance at the established church and non-conformity to its rites. The legislature in passing that act, only thought of easing the consciences of dissenters and not of allowing them to attempt to weaken the faith of the members of the church. The 9 and 10 W. III. was to give security to

the government by rendering men incapable of office, who entertained opinions hostile to the established religion. The only penalty imposed by that statute is exclusion from office, and that penalty is incurred by any manifestations of dangerous opinions without proof of the intention in the person entertaining it, either to induce others to be of that opinion, or in any manner to disturb persons of a different persuasion. This statute rested on the principle of the test laws, and did not interfere with the common law relative to blasphemous libels. It is not necessary for me to say whether it be libellous to argue from the scriptures against the divinity of Christ; that is not what the defendant professes to do. He argues against the divinity of Christ by denying the truth of the scriptures. A work containing such arguments published maliciously (which the jury in this case have found) is by the common law a libel, and the legislature has never altered this law, nor can it ever do so whilst the Christian religion is considered to be the basis of that law.

Rule Refused.

CHAPTER VII.

OF PUBLICATIONS TENDING TO SUBVERT MORALITY.

[*155] *It is now fully established, that any immodest and immoral publication, tending to corrupt the mind, and to destroy the love of decency, morality, and good order, is punishable in the temporal courts; though some doubt, as will appear from a brief review of the cases, seems formerly to have been entertained upon this subject.

Sir Charles Sedley (*a*) was indicted for having exposed his naked body in a balcony in Covent Garden, and for having committed other indecent acts before a great multitude of people. The indictment was openly read to him in court; and afterwards, on being required to take his trial at bar, he submitted to it. From the different reports of this case it appears, that after the abolition of the Star-chamber, the Court of King's Bench was considered as the *custos morum*, to whom the cognizance of such offences most properly be-

[*156] longed; and although it was afterwards contended, *that judgment was given against the defendant, on account of the personal violence he used in throwing down bottles upon the mob, yet from the language of the reporters, it clearly appears, that the Judges considered the offence to have been committed against modesty and good manners, and found it necessary to interfere in those profligate times (*b*) to punish such immodest practices, which the

(*a*) Keb. R. 720. 2 Str. 791. Foster 99. Mich. 15 C. 2.

(*b*) During those licentious times, it appears to have been of little use to convict offenders of this description; for though there were many prosecutions

court said were as frequent, as if not only Christianity but morality also had been neglected.

Hill (*c*) was indicted for publishing some obscene poems of Lord Rochester tending to the corruption of youth, but going abroad he was outlawed.

Read (*d*) was indicted for publishing a lascivious and obscene libel, and was tried and convicted before Ld. Holt, C. J. It was moved in arrest of judgment, that the offence was merely of spiritual and not of temporal cognizance; Ld. Holt was of opinion, that the offence ought to be punished in the Ecclesiastical Court, and the *Temporal Courts could not interfere, since there [*157] was no precedent for it (*e*); and Powell, J. regretted that it was not punishable at Common Law, since it certainly tended to the corruption of manners. And it does not appear, that any judgment was ever pronounced against the defendant (*f*).

The Attorney-General exhibited an information against Curl, for printing and publishing an obscene book, intitled, "Venus in the Cloister, or the Nun in her Smock." The defendant having been found guilty, it was moved in arrest of judgment, that the offence was of mere spiritual cognizance, that in the reign of Charles II. there was a run of obscene writings, for which no prosecutions were instituted in the temporal courts, and *Read's* case was cited.

It was answered by the Attorney-General (*g*), that to destroy morality is to destroy the peace of government, since government is no more than public order; that the Spiritual Courts punish only spiritual defamation *by words*, but that if it be reduced to writing, it is a temporal offence punishable as a libel.

The Judges had some difficulty at first in giving judgment against the defendant, chiefly, *on account of *Read's* [*158] case; but afterwards they gave it as their unanimous

against the players for immodest plays, they had interest enough to get the proceedings stayed before judgment. Frem. Ent. 209, 213, 214, 215.

(*c*) Str. 790. Dig. L. L. 60. Mich. 10 W. III.

(*d*) Easter, 6 Ann. Post. Rep. 98, 99.

(*e*) Sir C. Sedley's case seems to be a precedent in principle.

(*f*) 2 Str. 792.

(*g*) Sir Philip Yorke.

opinion, that this was a temporal offence. They said, it was plain, that the force used in *Sir C. Sedley's* case was but a small ingredient in the judgment of the Court, who fined him £2000. And that if the force was all they went upon, there was no occasion to talk of the Courts being *custos morum* of the King's subjects; that if *Read's* case were to be adjudged, they should rule it otherwise; and, therefore, gave judgment for the King.

An information (*h*) was granted against John Wilkes, for printing and publishing an obscene and impious libel, intituled "An Essay on Woman." Upon which he was convicted, and sentenced to pay a fine of £500, to be imprisoned for twelve months, and to find security for his good behaviour for seven years.

Ever since the decision in *Curl's* case, it seems to have been settled, that any publication tending to the destruction of the morals of society, is punishable by indictment; and a great number of convictions have since taken place, for publishing and vending immodest books and pictures.

With respect to the extent of the offence and mode of publication.

[*159] Although many vicious and immoral acts are *not indictable, yet if they tend to the destruction of morality in general, if they do or may affect the mass of society, they become offences (*i*) of a public nature. In the cases referred to, with the exception of *Sir C. Sedley's*, the defendants were indicted for printed libels; the principle, however, of those cases, and the express decision in *Sir C. Sedley's*, seem to comprehend other indecent and immoral communications, especially when made before a large assembly, such as the performance of an obscene play, which offence, it seems, has formed the ground of many prosecutions (*k*).

By the stat. 3 G. IV. c. 40, s. 3, all persons openly exposing or exhibiting in any street, road, public place, or highway, any indecent exhibition, or openly and indecently exposing their persons, shall be deemed rogues and vagabonds within the meaning of the act.

(*h*) 4 Burr. 2527.

(*i*) Sid. 168 *

(*k*) Str. 790.

CHAPTER VIII.

PUBLICATIONS AGAINST THE CONSTITUTION &c.

*It seems to be clear beyond dispute, that any member [*160] of the state has a right to suggest improvements in the constitution (*a*), and to point out what he conceives to be defects, and that though he be mistaken, he does not offend criminally, unless he be actuated by an intention to work mischief, evidenced by the licentious and insulting manner in which he treats of the established constitution and ordinances of the country. These, so long as they exist, ought to be secured from contumely and insult, least men's minds should be excited on the one hand to effect a hasty and ill judged demolition of the political fabric, or on the other should be provoked to acts of violence *in defence of a [*161] political establishment which they hold in reverence [1].

It is necessarily incident to every permanent form or system of government to make provision not merely for its continuance, but for its secure continuance. To that security the confidence and esteem of the people is indispensable, and therefore it is essential to

(*a*) Lord Loughborough, in the debate upon the Libel Bill, observed, " Every man may publish, at his discretion, his opinions concerning forms and systems of government; if they be wise and enlightening, the world will gain by them—if they be weak and absurd, they will be laughed at and forgotten—if they be *bona fide*, they cannot be criminal, however erroneous "

[1] The courts of the *United States* have no common law jurisdiction in cases of libel against the National Government. *The U. S. v. Hudson and Goodwin*, 7 Cranch 32.

prohibit malicious attempts to produce the mischiefs of political revolution, by rendering the established constitution odious to the society which has adopted it.

By the 13 Eliz. c. 1, it is a misdemeanor, punishable with forfeiture of goods and chattels, for any person to tell, affirm, or maintain, that the common laws of the realm, not altered by parliament, ought not to direct the right of the crown of England.

By the 6th Ann, c. 7, s. 7, it is made high treason to affirm by writing, or printing, that the king is not the lawful and rightful king of the realm, or that any other person has title to the same otherwise than according to the Bill of Rights, the Act of Settlement, and the Act of Union, or that parliament has not authority to limit the descent of the crown.

One of the earliest cases in which an opinion is given upon the indictable quality of words abstractedly reflecting upon the constitution, appears to have been given in the forty-first year [*162] of *Elizabeth; where it was adjudged, that no indictment lay for saying that the laws of the realm were not the laws of God, because true it is they are not the laws of God; but that it would be otherwise to say that the laws of the realm are contrary to the laws of God (*b*).

In the 15th (*c*) year of Ch. II. Brewster was a second time convicted for printing and publishing a libel, called "The Phoenix; or the solemn League and Covenant," in which it was declared that a king abusing his power may be opposed; that if he attempt to enforce his encroachments by arms, he may be resisted, because he has violated the contract and covenant made between himself and the people, and that the breaking this covenant was a greater sin than breaking a commandment.

Harrison (*d*) was convicted on an information charging him with having published concerning the government of England, and the traitors who adjudged King Charles I. to death: that the government of the kingdom consists of three estates, and that if a rebellion should happen in the kingdom, unless that rebellion was against the

(*b*) 2 Roll. Ab. 78.

(*c*) Hil. 15 Ch. II. K. B. Dig. L. L. 72.

(*d*) R. v. Harrison, 3 Keb. 841. Vent. 324. Dig. L. L. 66

three estates, it was no rebellion. It was moved in arrest of judgment, that there can be no rebellion *against [*163] the king, but it must be against the three estates, who are all united in the king. But the court overruled the objection, since by 13 C. II. c. 1, it is expressed, that neither one nor both Houses of Parliament can make war against the king, under any pretence whatever; and that though there be three estates as to making laws, there is but one authority as to war.

And the court supposing that the words tended to set on foot the position upon which the war, levied in 1641, by the two houses against the king was grounded, were much displeased that counsel would undertake to defend them.

The king had judgment, and the defendant brought error in parliament.

So a treatise upon hereditary right has been held to be a libel, though containing no reflection upon the existing government (*e*).

Tutchin was convicted(*f*) for publishing, in a paper called the Observer, that there were mismanagements in the government; that for such they had a right to call their governors to account, to displace the ministers, dethrone the reigning sovereign, and to transfer their allegiance to whom they pleased.

Dr. Browne (*g*) was convicted for writing a *libel, entitled [*164] "Mercurius Politicus," which asserted, that "the late revolution was the destruction of the laws of England."

Richard Nutt (*h*) was convicted upon an information, for publishing a libel, entitled "The London Evening Post," in which it was suggested, that the revolution was an unjust and unconstitutional proceeding; and the limitation established by the act of settlement was represented as illegal; and it was asserted that the revolution and settlement of the crown, as by law established, had been attended with fatal and pernicious consequences to the subjects of this kingdom.

(*e*) The Queen v. Bedford, 2 Str. 789.

(*f*) 2 Ld. Ray. 1061. Salk. 51. 6 Mod. 268.

(*g*) 11 Mod. 86.

(*h*) Dig. L. L. 68. 27 G. II.

In the prosecutions of Shebbeare, upon an information for a libel, and of Thomas Paine, on an information for a similar offence, one ingredient, though mixed up with many others, was an attack upon the justice and policy of the revolution, representing it as the origin and foundation of many political evils and calamities (i).

*So far as to publications which principally concern abstractedly the political establishment and constitution of the state; [*165] another class, and one *much more strongly and frequent-

(i) An information was exhibited by the Attorney-General against the defendant for printing and publishing a certain false, wicked, scandalous, seditious, and malicious libel, intituled "A Sixth Letter to the People of England, on the Progress of National Ruin, in which it is shown that the present grandeur of France, and the calamities of this Nation, are owing to the influence of Hanover on the Councils of England;" tending to traduce the revolution, and to represent it as the foundation of all those imaginary evils and calamities which he, the said defendant, would falsely insinuate the subjects of this kingdom did labour under, and also to asperse the memory of King William the Third and of King George the First, and to represent the public measures which were taken and pursued during the course of their respective reigns, as wicked, corrupt, and fatal measures to this kingdom, and also to asperse, scandalize, and vilify the late king and his administration of the government of this kingdom, and to make it thought that the public affairs of this kingdom were in the most unhappy and declining state, and that the subjects of this kingdom were unnecessarily and most intolerably loaded and oppressed with taxes, debts, and subsidies, and also to insinuate that the late king had no concern for the people of England, nor any regard for the interest, honour, or welfare of this kingdom, but that the treasure and riches of this kingdom were misapplied, wasted, and dissipated in support of the electorite of Hanover and his German dominions.

The defendant was found guilty of this libel; was fined £5, sentenced to the pillory, and imprisoned three years. Hilary Term, 31 Geo. II 1758, K. B. MSS. *The King v. Dr. John Shebbeare.*

The King v. Paine. This was an information against the defendant, filed by the Attorney-General, as the author and publisher of a malicious libel, the tendency of which was "to traduce and vilify the late happy revolution, the settlement of the crown and regal government, as by law established, and also the Bill of Rights, the legislature, government, laws, and parliament of this kingdom." The libel likewise contained many seditious and scandalous reflections upon his present majesty. This libel was tried before Lord Kenyon and a special jury, who, immediately after a speech from Mr. Paine's counsel, pronounced the defendant guilty, without any address or direction from the judge.

The defendant never appeared to receive the judgment of the court, and was consequently outlawed. 32 Geo. III. B. R. 1792, MS. *The King v. Paine.*

ly tending to produce public irritation and disorder, consists of malicious publications of a more personal nature, [*166] affecting either the king or his government, or ministers of justice, or either house of parliament, and tending to render them odious or contemptible.

Words (*k*) spoken, have frequently been deemed overt acts of treason for which the speakers have suffered. Two persons were executed for unguarded expressions in the reign of Edward IV. the one a citizen, who said he would make his son heir to the Crown (alluding to the sign of the house in which he lived)—the other, a gentleman, whose favourite buck the king had killed in hunting, whereupon the owner wished it horns and all in the belly of him who had counselled the king to kill it, and the king being his own counsellor on the occasion, the words were construed *into a treasonable expression against the king himself. [*167]

In the reign of Henry the Eighth, not only was a peer of the realm charged with having uttered treasonable words, which at most amounted to slander of his ministers, but a gentleman was charged with having *treasonably* expressed his displeasure at such proceedings (*l*).

But in less arbitrary times, the legality of such proceedings has been much questioned; and the rigour of the doctrine has at all

(*k*) Hale's Pl. Cro. C. 115. See also Hugh Pine's case, Cro. Car. 117, where other capital convictions for speaking words in that reign are cited.

(*l*) Surrey, anno tricesimo Henrici Octavi Henricus Marchia, Exon *praditorie* dicebat. *I like well of the proceedings of Cardinal Pool, et ulterius. But I like not the proceedings of this realm, and I trust to see a change of the world, et ulterius. I trust once to have a fair day upon those knaves which rule about the king, et ulterius. I trust to give them a Buffet one day. Et quod Nicolaus Carew, Miles, malitiosè, murmuravit indignatus fuit; et dicebat hac verba Anglicana. I marvel greatly that the indictment against the Lord Marquess was so secretly handled, and to what purpose, for the like was never seen. See Hugh Pine's case, Cro. Car. 117, where these and a number of other precedents were collected and considered by the judges.*

It is well known that, under the pretext that scandal of the magistrates amounted to the *crimen læsæ majestatis*, Sylla, Tiberius, and others, committed many assassinations at Rome.

events been greatly mitigated. It has been most humanely observed (*m*), that words may be spoken in heat, without any intention ; or be mistaken, perverted, or misremembered by the hearer ; their meaning depends always on their connection with other words and things ; they may signify differently, even according to the tone of voice with which they are delivered ; and sometimes silence is more expressive than any discourse. Since, therefore, there can be nothing more equivocal and ambiguous than words, it would be unreasonable to make them amount to high treason. Of this opinion were Stamford, *Ld. Coke*, *Ld. Hale* (*n*), *Sir Michael Foster* (*o*), and *Sir William Blackstone* (*p*), whose opinion has just been cited ; and in the reign of *Charles the First*, some very atrocious words having been spoken concerning the king by one *Pine*, all the judges certified, that “ though the words (*q*) were as wicked as they might be, yet that they were no treason ; for unless it be by some particular statute, no words will be treasonable.”

It seems to be clear (*r*), however that words joined to an act may explain it, and that words of persuasion to kill the king, or manifesting an *agreement, or consultation, or direction to that purpose, are sufficient overt acts of compassing his death.

It has frequently been held that words committed to print or writing, and published, amount to an overt act of treason, in proof of the compassing the king's (*s*) death ; but even in such case it seems that a publication is not necessary, though in arbitrary times, the contrary has been adjudged, particularly in the instances of *Peachum* (*t*), a clergyman, and of *Algernon Sydney* (*u*) ; the former of whom was convicted for treasonable passages in a sermon never preached, and the latter for some speculative opinions contained in

(*m*) 4 Black. Comm. 79.

(*n*) 1 Hale 111, 323.

(*o*) Fost. Cr. L. 200.

(*p*) 4 Bl. Com. 80.

(*q*) Cro. Car. 125. See Haw. Pl. Cr. c. 17, s. 32, 33, 34, 35, &c. Fost. Cr. L. 200. 1 Hale 111, 323.

(*r*) Haw. Pl. Cr. c. 17, s. 37. Fost. 202.

(*s*) 2 Roll. 89, 90. Fos. 346. 11 Modern 322. 1 St. Tr. 977. 3 St. Tr. 228. 5 Bac. Abr. 117.

(*t*) Cro. Car. 125.

(*u*) Foster 198.

papers discovered in his private closet ; but so unsatisfactory did the grounds of these convictions appear, that Peachum was not executed, and the attainder of Sydney was reversed.

The character and title of sovereign are guarded by the following legislative provisions. The st. 3 Ed. I. c. 34, (x) enacts, that none be *so hardy to tell or publish any [*170] false news or tales, whereby discord, or occasion of discord, may grow between the king and his people, or the great men of the realm (y).

(x) The stat. 3 Ed. I. c. 34, and 2 R. II. st. 1, c. 5, touching telling of news, were confirmed by the stat. 1 and 2 Phil. and Mary c. 3, (since expired) which enacted, that justices of peace in every shire, city, &c. shall have authority to hear and determine the said offences, and to put the said two statutes in execution. And that if any person shall be convicted or attainted for speaking maliciously, of his own imagination, any false, seditious, and slanderous, news, saying, or tales of the king or queen, then he shall for his first offence be set on the pillory in some market place near where the words were spoken, and have both his ears cut off, unless he pay to the queen an hundred pound within one month after judgment given, and also shall be three months imprisoned ; and if he shall speak any such slanderous and seditious news or tales, of the speaking or report of any other, then he shall be set on the pillory, and have one of his ears cut off, unless he pays an hundred marks to the queen's use within one month after, and shall be one month imprisoned ; and if he shall do it by book, rhyme, ballad, letter, or writing, he shall have his right hand stricken off. And if any person being once convicted of any offence aforesaid, do afterward offend he shall be imprisoned during his life, and forfeit all his goods and chattels. And see 4 and 5 Ph. & M. c. 9. 1 Eliz. c. 6, (now expired.)

(y) See the stat. 1 W. and M. st. 2, c. 2, s. 9. By a statute in the reign of H. VIII. it was made high treason to write or devise by words, or in writing, or to imagine, invent or attempt any bodily harm to be done to the king, the queen, or their heirs apparent. By a statute of Elizabeth, it was made high treason to intend destruction or bodily harm to the queen, or to affirm that the laws and statutes do not bind the right of the crown, and the descent, limitation, inheritance, and government thereof.

And whosoever shall, during the queen's life, by any booke or worke, written or printed, expressly affirm, before the same be established in parliament, that any one particular person is, or ought to be heir and successor to the queen, except the natural issue of her body, shall, for the first offence, be a whole year imprisoned, and forfeit half his goods ; and for the second, shall incur the penalties of a præmunire. These laws expired on the demise of that queen.

[*171] *By 6 Ann. c. 7, s. 7, it is made high treason to affirm, by writing or printing, that the king is not the lawful and rightful king of the realm, or that any other person has title to the same, otherwise than according to the Bill of Rights (*y*), the Act of Settlement (*z*), and the Act of Union, or that parliament has not authority to limit the descent of the crown.

By the 36th Geo. III. c. 7, it is enacted, that if any person shall imagine or intend death, destruction, or any bodily harm to the person of the king, or to depose him, or to levy war, in order by force to compel him to change his measures or coun-

[*172] sels, &c. and shall express and declare *such intentions by *printing, writing*, or any overt act, he shall suffer death as a traitor.

And that if any one by writing, printing, preaching, or other speaking, shall use any words or sentences to incite the people to hatred and contempt of the king, or of the government and constitution of this realm, he shall receive the punishment of a high misdemeanor; that is, fine, imprisonment, and pillory, and for a second offence, he is subject to a similar punishment, or transportation for seven years, at the discretion of the court. The time of prosecution under the act is limited to six months, and the statute does not affect any prosecution at common law, unless a prosecution be previously commenced under the statute.

At common law, any contempt of the king's person amounts, on principles of policy too obvious for observation or comment, to a high misdemeanor. Such a contempt may either consist in the imputing to him the want of capacity or integrity (*a*), in charging him with a breach of his coronation oath (*b*), cursing him, wishing him ill, spreading false rumors concerning his intentions (*c*),—or, in

[*173] short by maliciously asserting *anything concerning him, which tends to lessen him in the esteem of subjects, weak-

By an act in the reign of Ed. VI. which expired with that king, it was made high treason to assert in print or in writing, that he was not supreme head of the church.

(*y*) See note (*y*) ante p. 170.

(*z*) 12 and 13 W. III. c. 2.

(*a*) Hawk. P. C. c. 23. 4 Bl. Com. 120.

(*b*) Noy 105. Haw. Pl. Cr. c. 23. s. 5.

(*c*) See 3 E. I. c. 34.

en his government, or raise jealousies between him and his people. These are considered as high contempts and misprisions, and are punishable as misdemeanors at common law.

So, to deny the king's title to the crown, or to raise doubts concerning it, in unadvised discourse, would amount to a contempt at common law; and to do it deliberately and advisedly, if it did not constitute treason, would at least subject the offender (*d*) to the penalties of a *præmunire*.

In the reign of Elizabeth (*e*), all the Justices and Barons of the Coif assembled in Serjeant's Inn, concerning a book, devised by one Brown, containing the following passage, "Every preacher runneth to the queen now, as though he were to be directed by her to tarry for reformatations to be had for matters of the church. If the magistrates will agree, all is well; if they will not, they are not of the church, and it is a shame to tarry for them, or for a parliament, or proclamation." And it was held by all, that this was a moving of insurrection and sedition (*f*).

*In the Digest (*g*) of the Law of Libel it is said, that [**174*] at the same meeting, Sir Edmund Anderson, Ch. J. of the Common Pleas, propounded the following case to his brethren:—A person had caused the arms of the queen to be painted upon a post in a church in Suffolk, with this inscription painted near them, "I know thy works, that thou art neither hot nor cold; I would thou wert either hot or cold: therefore, because thou art lukewarm, it will come to pass that I will spew thee out of my mouth." But the justices came to no resolution.

John Wilkes (*h*) was convicted upon an information filed by the Attorney-General (*i*), for printing and publishing a malicious libel,

(*d*) Black. Comm. 123. Haw. Pl. Cr. c. 17, s. 35, *supra* 171.

(*e*) Dig. L. L. 65.

(*f*) The question proposed was, whether the publication was an offence within the 23d Eliz. c. 2, which was a temporary stat.; but under the construction which the judges put upon this book, it was a libel at common law.

(*g*) D. L. L. 66. Sav. 49.

(*h*) Dig. L. L. 69. Informations were also filed against Kearsley and Williams, for printing and publishing the same.

(*i*) Charles Yorke, Esq.

entitled *The North Briton*, No. 45, tending to vilify and traduce the king and his government—to impeach and disparage his veracity and honour—and to represent and make it believed that his majesty's most gracious speech, delivered from his throne to the parliament, on Tuesday the 19th day of April, 1763, contained many [*175] falsities and gross *impositions upon the public; and that his majesty had suffered the honour and dignity of his crown to be sunk and prostituted, and the interests of his subjects and allies to be treacherously betrayed; and also to render the king and his government contemptible and odious, and to excite tumults, commotions, and insurrections, &c. &c.

An information (*k*) was filed by the Attorney-General against the printer and proprietor of the *Morning Chronicle* newspaper, for publishing the following paragraph, with a malicious intent to alienate from the king the affections of his subjects:—"What a crowd of blessings rush upon one's mind, that might be bestowed upon the country, in the event of a total change of system. Of all monarchs, indeed, since the revolution, the successor, of George the Third will have the finest opportunity of becoming nobly popular."

Lord Ellenborough, C. J. in summing up to the jury observed, "The first sentence admits of an innocent interpretation—'What a crowd of blessings rush upon one's mind, that might be bestowed upon the country, in the event of a total change of system.' The fair meaning of the expression, 'change of system,' I think, is a change of political system, not a change in the *frame of [*176] the established government, but in the measures of policy which have been for some time pursued. By total change of system, is certainly not meant subversion or demolition; for the descent of the crown to the successor of his majesty is mentioned immediately after. The writer goes on to speak of the blessings that may be enjoyed upon the accession of the Prince of Wales; and therefore cannot be understood to allude to a change inconsistent with the full vigor of the monarchical part of the constitution. Now I do not know that merely saying there would be blessings from a change of system, without reference to the period at which they

may be expected, is expressing a wish or a sentiment that may not be innocently expressed in reviewing the political condition of the country. The information treats this as a libel on the person of his majesty, and his personal administration of the government of the country. But there may be error in the present system, without any vicious motives, and with the greatest virtues, on the part of the reigning sovereign. He may be misled by the ministers he employs, and a change of system may be desirable from their faults. He may himself, notwithstanding the utmost solicitude for the happiness of his people, take an erroneous view of some great question of policy, either foreign or domestic. I know of but one

*Being to whom error may not be imputed. If a person [*177] who admits the wisdom and virtues of his majesty, laments that in the exercise of these he has taken an unfortunate and erroneous view of the interests of his dominions, I am not prepared to say that this tends to degrade his majesty, or to alienate the affections of his subjects. I am not prepared to say that this is libellous: but it must be with perfect decency and respect, and without any imputation of bad motives. Go one step further, and say or insinuate, that his majesty acts from any partial or corrupt view, or with an intention to favor or oppress any individual or class of men, and it would become most libellous. However, merely to represent that an erroneous system of government obtains under his majesty's reign, I am not prepared to say exceeds the freedom of discussion on political subjects which the law permits. Then comes the next sentence: 'Of all the monarchs, indeed, since the revolution, the successor of George the Third will have the finest opportunity of becoming nobly popular.' This is more equivocal, and it will be for you, gentlemen of the jury, to determine what is the fair import of the words employed. Formerly it was the practice to say, that words were to be taken in the more lenient sense; but that doctrine is now exploded; they are not to be taken in the more lenient or more *severe sense, but in the sense which fairly belongs to them, and which they were intended to convey. [*178] Now, do these words mean, that his majesty is actuated by improper motives? or that his successor may render himself nobly

popular by taking a more lively interest in the welfare of his subjects ? Such sentiments, as it would be most mischievous, so it would be most criminal to propagate. But if the passage only meant that his majesty, during his reign, or any length of time, may have taken an imperfect view of the interest of the country, either respecting our foreign relations, or the system of our internal policy ; if it imputes nothing but honest error, without moral blame, I am not prepared to say that it is a libel.

The extract read at the request of the defendants does seem to me too remote, in point of situation, in the newspaper, to have any material bearing on the paragraph in question. If it had formed a part of the same discussion, it must certainly have tended strongly to show the innocence of the whole. It speaks of that which every body in his majesty's dominions knows—his majesty's solicitude for the happiness of his people ; and it expresses a respectful regard for his paternal virtues. What connection it has with the passage set

out in the information, it is for you to determine. Taking that passage substantively, and by itself, it is a matter I think, somewhat doubtful, whether the writer meant to calumniate the person and character of our august sovereign. If you are satisfied that this was his intention, by the application of your understandings honestly and fairly to the words complained of, and you think they cannot properly be interpreted by the extract which has been read from the same paper, you will find the defendants guilty. But if, looking at the obnoxious paragraph by itself, you are persuaded that it betrays no such intention ; or if, feeling yourselves warranted to import into your consideration of it a passage connected with the subject, though considerably distant in place, and disjoined by other matter, you infer from that connection that this was written without any purpose to calumniate the personal government of his majesty, and render it odious to his people, you will find the defendant not guilty. The question of intention is for your consideration. You will not distort the words, but give them their application and meaning, as they impress your minds. What appears to me most material is the substantive paragraph itself ; and if you consider it as meant to represent that the reign of his ma-

jesty is the only thing interposed between the subjects of this country and the possession of great blessings, which are likely to be enjoyed in the reign of his successor, and thus *to [*180] render his majesty's administration of his government odious, it is a calumnious paragraph, and to be dealt with as a libel. If, on the contrary, you do not see that it means distinctly, according to your reasoning, to impute any purposed mal-administration to his majesty or those acting under him, but may be fairly construed an expression of regret that an erroneous view has been taken of public affairs, I am not prepared to say that it is a libel. There have been errors in the administration of the most enlightened men. I will take the instance of a man, who for a time administered the concerns of this country with great ability, although he gained his elevation with great crime, I mean Oliver Cromwell. We are at this moment suffering from a most erroneous principle of his government, in turning the balance of power against the Spanish monarchy, in favour of the House of Bourbon. He thereby laid the foundation of that ascendancy, which, unfortunately for all mankind, France has since obtained in the affairs of Europe. The greatest monarchs who have ever reigned—monarchs who have felt the most anxious solicitude for the welfare of the country, and who have in some respects been the authors of the highest blessings to their subjects, have erred; but could a simple expression of regret for any error they had committed, or an earnest wish to see that error corrected, be considered *as disparaging them, or [*181] tending to endanger their government? Gentlemen, with these directions, the whole subject is for your consideration. Apply your minds candidly and uprightly to the meaning of the passage in question: distort no part of it for one purpose or another, and let your verdict be the result of your fair and deliberate judgment (l).”

In the case of the *King v. Harvey (m)*, it was held to be an indictable offence to publish falsely of the king, or of any other person, that he laboured under mental derangement. The libel was as follows:—“Attached as we sincerely and lawfully are to every interest connected with the sovereign, or any of his illustrious relatives,

(l) The defendant was acquitted.

(m) 2 B. and C. 257.

it is with the deepest concern we have to state, that the malady under which his majesty labours is of an alarming description. It is from authority we speak." The libel then stated several facts relating to the king's illness. At the trial, before Abbott, C. J. at the London Sittings after last term, the publication of the libel was proved in the usual manner, and it was admitted, by the counsel for the defendants, that the libel imported that the king laboured under

insanity ; and that that assertion was untrue ; but it was [182] urged to the jury that the defendants *believed the fact to be true, and that they were warranted in so doing, by rumours which had been very prevalent on the subject. The Lord Chief justice, in his address to the jury, after stating the import of the publication, proceeded as follows :—" To assert falsely of his majesty, or of any other person, that he labours under the affliction of mental derangement, is a criminal act. It is an offence of a more aggravated nature to make such an assertion concerning his majesty, by reason of the greater mischief that may thence arise. It is distinctly admitted by the counsel for the defendants, that the statement in the libel was false, in fact, although they assert that rumors to the same effect had been previously circulated in other newspapers. Here the writer of this article does not seem to found himself upon existing rumours, but purports to speak from authority, and inasmuch as it is now admitted that the fact did not exist, there could be no authority for the statement. In my opinion, the publication is a libel calculated to vilify and scandalize his majesty, and bring him into contempt among his subjects. But you have a right to exercise your own judgment upon the publication, and I invite you so to do. The jury found the defendants guilty (n).

(n) After the jury had retired about two hours, they returned into court, and the foreman said that the jury wished to have the opinion of the Lord Chief Justice, whether it was or not necessary that there should be a malicious intention to constitute a libel. To this question the Lord Chief Justice returned the following answer.—" The man who publishes slanderous matter, calculated to defame and vilify another, must be presumed to have intended to do that which the publication is calculated to bring about, unless he can show the contrary, and it is for him to show the contrary. There may indeed be innocent publications of that which, in its own nature, is injurious to another, as, for instance, the delivery of a book, containing libellous matter, to a magistrate ; but the general rule is, that the person must be taken to have intended to do that which his act is

*Next as to libels on the government: it is the undoubted right of every member of the community *to publish his own opinions on all subjects of public and common interest, and so long as he exercises this inestimable privilege candidly, honestly, and sincerely, with a view to benefit society, he is not amenable as a criminal. This is the plain line of demarcation; when this boundary is overstepped, and the license is abused either for the wanton gratification of private malice, in aiming a stab at the private character of a minister, under colour and pretence of discussing his public conduct, or where either public men or their measures are denounced in terms of obloquy and contumely, under pretence of exposing defects and correcting errors, but in reality, for the purpose of obstructing and impeding the administration of public affairs, or of alienating the affections of the people from the king and his government, and by weakening the ties of allegiance and loyalty, to pave the way for sudden and violent changes, sedition, or even revolution; in these and similar instances, where public mischief is the object of the act, and the means used are calculated to effect that object, the publication is noxious and injurious to society, and is therefore criminal. It has justly been observed that the life of government is reputation, an administration destitute of the support and encouragement to which the good opinion of the people is essential, must necessarily be timid and indecisive, *and consequently weak and ineffectual. [*183] [*184] [*185]

It has been asserted by high authority (o), that “ every freeman calculated to effect.” The jury again retired for about three hours, and then returned a verdict of guilty, but recommended the defendant to mercy. A motion was afterwards made for a new trial, upon the ground of a supposed misdirection on the part of the Chief Justice, but the court were of opinion, that his direction was right, that the assertion that the fact was communicated from authority where it turned out to be false, was a false statement, and that such a communication being in itself mischievous and injurious, malice must necessarily be inferred, since a party must, in point of law, be considered to have intended that which is the natural consequence of what he does. See *R. v. Creevy*, 1 M. and S. 273, *supra*. *R. v. Farrington*, 2 Russ. 1675. *R. v. Mazagora*, Bayley on Bills, 413. Russ. and Ry. C. C. L. 291. See further, as to contempts against the king, Cro. J. 38, and the case of *A. Scott*, for publishing false news. O. B. June Sess. 1788. Haw. P. C. c. 23. s. 4. (o) 4 Bl. Comm. 151.

has an undoubted right to lay what he pleases before the public—to forbid this is to destroy the freedom of the press ; but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity.”

On the trial of James Perry and another (*p*), on an information for a libel, the Attorney-General, in his opening to the jury, observed, “From the bench you will hear laid down, from the most respectable authority, the law which you are to apply to those facts. The right of every man to represent what he may conceive to be an abuse or grievance in the government of the country, if his intention in so doing be honest, and the statement made upon fair and open grounds, can never for a moment be questioned. I shall never think it my duty to prosecute any person for writing, printing, and publishing, fair and candid opinions on the system of the government and constitution of this country, nor for pointing out what [*186] *he may honestly conceive to be grievances, nor for proposing legal means of redress.”

It would exceed the proposed limits of this treatise, to cite cases in detail under this division ; every case, indeed, falling within it, is too intimately involved in its particular circumstances to admit of any abstract rules less general than the elements which have been laid down as essential to such an offence, the plain intrinsic tendency (*q*) of the communication to produce public disorder, and the malicious intention of its author (*r*).

(*p*) Before *Ld. Kenyon*, 1793. See *Ridgway's Collection*, &c. 2 vol. 371.

(*q*) See *R. v. Beare*, 12 *Mod.* 221. *Ld. Ray.* 418. *Dig. L. L.* 19, 121. *R. v. Bedford*, 2 *Str.* 789. *Rex v. Owen*, *K. B. MSS. Dig. L. L.* 67. *R. v. Lawrence*, 12. *Mod.* 311. *R. v. Bliss*, *Clerk, K. B. MSS. 5 G. 1. Dig. L. L.* 122.

(*r*) A person delivered a ticket up to the minister after a sermon, wherein he desired him to take notice, that offences passed now without control from the civil magistrate, and to quicken the civil magistrate to do his duty, &c. This was held to be a libel, though no magistrates in particular were mentioned, and though it was not averred that the magistrates suffered these vices knowingly. And the ground of the conviction has been stated to be, that general misrepresentations of the government or state of the nation, or mutinous hints, tend to excite discontent and sedition in the people, and that the generality of the reflection made it the more dangerous, since it had a bad effect on the whole frame of government. *Sid.* 219. *Rol.* 773. *Bac. Ab. tit. Libel*, 450.

*Next, as to publications against the administration of justice. [*186]

Contempts against the King's Judges, and scandalous reflections on their proceedings, fall within the same consideration

Lawrence was convicted upon an information charging him with having sent a letter to Sir John Pigot, desiring him to *moderate [*187] his zeal, for that the king (meaning King James II.) would soon be restored ; and that for further satisfaction herein, he would soon hear that many lords would repair to him to France, what to do he might guess. The defendant was fined forty marks. 12 Mod. 311. Dig. L. L. 121.

John Tutchin was convicted upon an information for publishing several libels containing the following paragraphs :—

“ If we may judge by our national miscarriages, perhaps no nation has felt the influence of French gold more than England ; and worthy it is of our greatest lamentation, that our dear country should be thus weakened by men of mercenary principles, when countries, inferior to us in strength and riches, are secured from attempts of this nature only by the fidelity of their people. What is the reason that French gold has not affected Holland as well as England, but that their ministry is such as is entirely in the interest of their country, and altogether incorruptible. They prefer men that are knowing in their posts, and are active in business, when in England we find out offices for men, and not men for offices. By this and by preferring men by interest and favour, have the excise, the customs, and other branches of the revenue, intolerably sunk, and by this means has the navy of England, our chief support, been hitherto perfectly bewitched. And can Lewis spend his money better, than in getting men into office in England, who are either false or ignorant in the business, or who are his friends.”

Ld. Holt, C. J. in summing up to the jury, observed, “ To say that corrupt officers are appointed to administer affairs is certainly a reflection on the government. If persons should not be called to account for possessing the people with an ill opinion of the government, no government can subsist ; nothing can be worse to any government, than to endeavour to procure animosities as to the management of it ; this has always been looked upon as a crime, and no government can be *safe unless it be punished. Now you are to [*188] consider, whether these words I have read to you, do not tend to begot an ill opinion of the administration of the government.” 5 St. Tr. 532. A. D. 1704.

John Clarke was found guilty upon an information, charging him with having printed and published a malicious libel, intituled “ Mist's Weekly Journal,” containing false, malicious, and seditious reflections on his late and present majesty, by drawing odious parallels, and thereby maliciously and falsely insinuating our government to be tyrannical, and the ministry corrupt and abominable. 9. St. Tr. 273. A. D. 1729.

Richard Franklin was found guilty upon an information, charging him with having printed and published a malicious libel, intituled “ No. 235, The Coun-

with the last mentioned class of offences, since nothing tends more to disturb public order than to infuse suspicions concerning the administration of justice.

try Journal, or the Craftsman," containing an extract from a private letter from the Hague, with intent (*inter alia*) to scandalize and vilify the administration of his majesty's government of this kingdom, and his principal officers and ministers of state as persons of no integrity and ability, and as enemies to the public good of this kingdom.

The information stated, "That a treaty of peace having been concluded between his Majesty George the Second and the Kings of France, Spain, &c. and that the defendant well knowing the premises, &c. and contriving to disturb the happy state of the public peace and the tranquility of the kingdom, &c. and to bring his present majesty's treaty of peace into contempt and disgrace, and also to detract, scandalize, traduce, and vilify the administration of his present majesty's government of the kingdom, and his principal officers and ministers of state, and to represent them as persons of no integrity or ability, and as enemies of the public good of the kingdom, &c. The information then proceeded to the publication of the libel, and set out the libellous matter, which was to the effect of the above allegations.

The defendant's counsel were Mr. Fazakerley and Mr. Bootle. [*189] *After the evidence had concluded on the part of the crown, Mr.

Fazakerley offered to prove some of the contents of the libel to be true. He was immediately interrupted by Lord Raymond, Lord C. J.—"As for your saying that you can prove what is charged on the defendant to be true, it is my opinion that it is not material whether the facts charged in a libel be true or false, if the prosecution be by indictment or information, and that writing and printing may be libellous, though the scandal is not charged in direct terms, but only ironically." His Lordship added, "even a private man's character is not to be scandalized, either directly or indirectly, because there are remedies appointed by law, in case he has injured any person without maliciously scandalizing him in his character. And much less is a magistrate, minister of state, or other public person's character to be stained, either directly or indirectly. And the law reckons it a greater offence, when the libel is pointed at persons in a public capacity, as it is a reproach to the government to have corrupt magistrates, substituted by his majesty, and tends to sow sedition and disturb the peace of the kingdom. Therefore, I shall not here allow of any evidence to prove that the matters charged in this libel are true, for I am only abiding by what had been formerly done in other cases of the like nature."

The observations of Sir Philip Yorke, Attorney-General, on the part of the prosecution, seems to have been afterwards adopted by the court. He observes, "There is another thing mentioned, which is, that if this Hague letter was construed a libel, it would tend to the utter destruction of the liberty of the press. My lord, I am really at a loss to know what sort of liberty they mean.

Offences of this nature may consist either in the more gross violation of decency, by making use of contumelious and insolent lan-

I hope they do not mean a licentious and unbounded liberty to libel and scandalize his majesty or his principal officers and ministers of state, or his magistrates, or even any of the meanest of his subjects, whenever they think fit. Gentlemen, I would have you to know that even the prerogative of the king is founded upon law, and limited by it, *and so are all things [*190] relating to his subjects, and it cannot be supposed that a printer only is exempted, and at liberty to use his press for what purposes he pleases. If he is, I desire that the defendant's counsel would point out that law. No, the law is not so absurd as to allow such a liberty of the press. The liberty meant is to be understood of a legal one. He may lawfully print and publish what belongs to his own trade, but he is not to publish anything reflecting on the character and reputation and administration of his majesty or his ministry or his ministers, nor yet to stain the character or reputation of any of his subjects. For, as I said before, to scandalize and libel people is no part of his trade; so I say it is only that liberty of the press which he is to use that is regulated by law and subjected to it, and if he breaks that law and exceeds that liberty of the press, he is to be punished for it, as well as for breaking other laws or liberties. And, gentlemen, though it has been insinuated to you, from the other side, that the making such things a libel came from the Star Chamber, yet I must tell you, that the printing such defamatory expressions or slanderous news was deemed a libel, and punished accordingly, long before the Star Chamber. It is a law made in 1275, in the third of King Edward the First intitled 'An Act that none shall report slanderous news whereby discord shall arise,' &c. &c. So, gentlemen, you see that this law of libel is not a new law, or one that came from the Star Chamber, but one that has been almost of five hundred years standing; therefore I hope you will not suffer yourselves to be amused by such things. The Court of Star Chamber, punished without juries, but though juries were taken away, yet the law remained the same as to libels and crimes. So I hope it appears to you to be very plain, that the liberty of the press is limited and governed by law, and that the law sets limits both to the king and his subjects."

The defendant, after a charge from the Chief Justice, who admitted the full force and propriety of the Attorney-General's *address, was [*191] found guilty. The term following, he was sentenced to pay a fine of £800, to be imprisoned for one year, and to find security for his good behaviour for seven years, &c. No arrest of judgment was ever moved for, or writ of error brought upon the record. *State Trials*, vol. 9, p. 255.

The King v. Horne.—This was an information filed against the defendant by his majesty's Attorney-General on behalf of his majesty, for writing, printing, and publishing two libels.

The first count of the information stated, that the said John Horne being a wicked, malicious, seditious, and ill-disposed person, and being greatly disaffect-

guage in the face of the court, or in the publishing of reflections on the purity of its proceedings tending to obstruct the course of justice.

Generally, any contemptuous or contumelious words, when spoken

ed to our said present sovereign lord the king, and to his administration of the government of this kingdom, and the dominions thereunto belonging, and wickedly, maliciously, and seditiously intending, devising, and contriving to stir up and excite discontents and seditions, among his majesty's subjects, and to alienate and withdraw the affection, fidelity, and allegiance of his said majesty's subjects from his said majesty, and to insinuate and cause it to be believed, that divers of his said majesty's innocent and deserving subjects had been inhumanly murdered by his said majesty's troops in the province, colony or plantation of the Massachusetts Bay in New England, in America, belonging to the crown of Great Britain, and unlawfully and wickedly to seduce and encourage his said majesty's subjects in the said province, colony or plantation, to resist and oppose his majesty's government, on the 8th day of June, in the 15th year of the reign, &c., with force and arms, at London aforesaid, in the parish of St. Mary Le-Bow, in the ward of Cheap, wickedly, maliciously, and seditiously did write and publish and cause and procure to be written, and published, a certain false, wicked, malicious, scandalous, and seditious libel, of and concerning his said majesty's government and the employment of his troops according to the tenor and effect following :—“ King's Arms Tavern, Cornhill, June 7th,

[*192] 1775. At a special meeting, this day, of several members of *the Constitutional Society, during an adjournment, a gentleman proposed that a subscription should be immediately entered into, (by such of the members present who might approve the purpose, for raising the sum of £100 to be applied to the relief, of the widows, orphans, and aged parents of our beloved American fellow subject who faithful to the character of Englishmen, preferring death to slavery, were for that reason only inhumanly murdered by the king's (meaning his said majesty's) troops, at or near Lexington and Concord, in the province of Massachusetts, (meaning the said province, colony, or plantation of Massachusetts Bay in New England, in America,) on the 19th of last April, which sum being immediately collected, it was thereupon resolved that Mr. Horne (meaning himself the said John Horne,) do pay to-morrow into the hands of Messieurs Brownes and Collison, on the account of Dr. Franklin, the said sum of £100, and that Dr. Franklin be requested to apply the same to the above mentioned purpose. John Horne (meaning himself the said John Horne,) in contempt of our said lord the king, in open violation of the laws of this kingdom, to the evil and pernicious example of all others in the like case offending, and also against the peace of our said present sovereign lord the king, his crown and dignity.”

There were other counts in the information, charging the said John Horne with causing the same libel to be printed in the London Packet, or New Lloyd's Evening Post, and the Morning Chronicle, or London Advertiser.

to the judges of any courts, in the execution of their office, are indictable (*s*). As if one give the lie (*t*) to [*195]

The defendant pleaded—Not guilty.

The information was tried at the Sittings in London after Trinity Term, 1777, before Lord Mansfield, by a special jury, and the defendant found guilty of all the offences charged in the information.

The Courts of K. B. afterwards passed the following sentence upon Mr. Horne:—"To pay a fine of £200, to be imprisoned one year, and to give securities for his good behaviour for three years." Afterwards the defendant brought a writ of **error in the House of Lords*, but the judgment of the King's Bench was affirmed. Cowp. Rep. 672, and 11 St. [*193] Tr. 264.; see also *R. v. Burdett*, 4 B. and A. 115, 314.

The King v. Cobbett.—This was an information filed by the Attorney-General against the defendant, for a libel published in the "Weekly Register," in the form of a letter signed *Juvena*. It was a libel upon the administration of the Irish government, and upon the public character and conduct of the Lord Lieutenant and Lord Chancellor of Ireland. Mr. Cobbett was not the author, but merely the publisher of this letter. After the libel had been proved, and the defendant's counsel heard, Lord Ellenborough, in his address to the jury, observed, "the law of England is a law of liberty; and, consistently with this liberty, we have no imprimatur, there is no such preliminary license necessary. But if a man publish a paper he is exposed to penal consequence, as he is in doing every other act, if it tend to the prejudice of any individual. It is no new doctrine, that if a publication be calculated to alienate the affections of the people, by bringing the government into disesteem, whether the expedient be by ridicule or obloquy, the person so conducting himself is exposed to the inflictions of the law. It is a crime. It has ever been considered as a crime, whether wrapt in one form or another. The case of the *King v. Tutchin*, decided in the time of Lord Chief Justice Holt, has removed all ambiguity from this question; and although at the period when that case was decided, great political contentions existed, the matter was not again brought before the judges of the court by any application for a new trial." Again, his lordship says, "No man has a right to render the person or abilities of another ridiculous, not only in publications, but if the peace and welfare of individuals or of society be interrupted, or even exposed by types and figures, the act by the law of England is a libel." And again, "It has been observed, that it is the right of the British subject to exhibit the folly or imbecility of the members of the government. But gentlemen, we must confine ourselves within limits. If, in so doing, individual feelings are violated, there the line of interdiction begins, and the offence becomes the subject of penal visitation." The defendant was found guilty, but not called up for judgment, having redeemed himself by giving up the author of the libel, who was immediately prosecuted and convicted. E. T. K. B. 1804. *The King v. Johnson*, 7 East. 65.

(*s*) 1 Sid. 144. Str. 420. 2 Rol. Ab. 78. In *The King v. Revell*, 1 Str.

a judge of a court leet, in the face of the court; or, being admonished by him to pull off his hat, (*u*), say, "I do not value what you can do;" or tell him in the face of the court, that he is forsworn (*x*), or call him a fool (*y*), or say, "If I cannot have justice here, I will have it elsewhere (*z*)."

When reflecting words are spoken of the judges of the superior courts, at Westminster, the speaker is indictable both at common law and under the statutes of *Scandalum Magnatum*, whether the words relate to their office or not.

With respect to inferior magistrates, such as justices of the peace, it seems to be clear, on the authorities, that abusive and defamatory words spoken of them in their absence, and [*196] which do not relate to the execution of their office, *are not indictable (*a*). And even although the words affect them generally in their office, as where they impute want of ability, capacity, or integrity, it seems that they are not indictable. For though the contrary seems to have been held in *Darby's* [*197] case (*b*), *yet that decision has been materially im-

420, it was held that the words "you are a rogue and a liar," spoken to a justice of the peace in the execution of his office, were indictable, and that such words spoken of him in his absence would also have been indictable. See also *R v. Darby*, 3 Mod. 139.

Other cases may be referred to, in which the same doctrine has been repeated in the judgments of the court upon defendants convicted of public libels. In the case of *The King v. Cobbett*, K. B. 1810, for a libel, tending to excite disaffection in the army, and the cases of *The King v. Fisher*, *The King v. Lovel*, *The King v. Gale Jones*, and *The King v. Drankard*, the same general principles were expounded and applied. See also *The King v. Burdett*, 4 B. and A. 115, 314.

(*t*) *Ow.* 113. *Mo.* 470. *Cro. Eliz.* 581.

(*u*) *Ray.* 78. 1 *Keb.* 451, 465.

(*x*) 2 *Rol. Ab.* 78.

(*y*) *Cro. Eliz.* 78.

(*z*) 1 *Sid.* 144. *Keb.* 508.

(*a*) See the following note.

(*b*) 3 Mod. 139. (*S. C. Comb.* 65. *Carth.* 14.) The defendant was indicted for speaking scandalous words of Sir J. Kearle: a Justice of the Peace, viz, "Sir John Kearle is a baffleheaded fellow and doth not understand the law; he is not fit to talk with me; I have baffled him, and he hath not done my client justice." And the court is reported to have held, that though the words were not actionable, yet they were indictable for the reason given in the text. In

peached by other authorities. Indeed the reason there given for *holding such words to be indictable, that it is [*198]

the subsequent case of the *Queen v. Langley*, Salk. 697, on an indictment for saying to the Mayor of Salisbury, you are a rogue and a rascal; Holt, C. J. held that the words were not indictable, the mayor not being in the execution of his office nor a patent officer; and that it did not appear that the mayor was a justice of the peace, at least, not by commission from the king; yet that, if the words had been written, an indictment would have lain. Et per totam curiam, words that directly tend to a breach of the peace, as if one man challenge another, are indictable; and the commission of oyer and terminer de propalationibus verborum is to be construed of words against the government or scandalum magnatum, &c.; but for these petit offences which are contra bonos mores, the law has another provision, by requiring surety of the peace and good behaviour, in default whereof the magistrate may commit him, when spoken out of court; and when in court the magistrate may proceed summarily against him and fine him for the contempt.

In the report of the same case, 6 Mod. 125, it is stated that after great deliberation they adjudged the words were not indictable, for it is not so much as said, that he was in the execution of his office or a justice of the peace. Indeed had they been put into writing, they would be a libel, punishable either by indictment or action; but they are but loose and unmannerly words, like those spoken of an alderman of Hull, "when he puts on his gown, Satan enters into it," which were adjudged not indictable in Kelynge's time; (1 Mod. 35.) You are a forsworn mayor and have broken your oath, not indictable, (Stiles, 251.) And binding him to good behaviour is sufficient to secure the authority of mayors; but that must be done instantly, according to Dr. Bonham's case, (Stiles, 251.) and Holt, C. J. said, that words which led directly to a breach of the peace may be indictable; otherwise to encourage indictments for words would make them as uncertain as actions for words are.

Again in the case of the *Queen v. Wrightson*, Salk. 698, which was an indictment for saying of Sir Rowland Gwyn, a justice of the peace, in discourse, concerning a warrant made by him; "Sir Rowland is a fool, an ass, and a coxcomb, for making such a warrant, and he knows no more than a stick-bill;" the court held, on demurrer, that there was a breach of good manners, for which he might be bound to the good behaviour, yet there was no indictable offence. And in this case, many of the former authorities were referred to, viz. 2 Keb. 494. Hutt. 131. 1 Cro. 362. 3 Mod. 139. 1 Vent. 169, and R. v. Selby, Mich. 4 Ann. K. B. where the defendant was indicted for the words, "He is not fit to be a justice, for if a man is before him he will give it right or wrong where his affection is;" and where it was held that the indictment lay not. Et per Holt, C. J. to say a justice is a fool, or an ass, or a coxcomb, or a bufflehead, is not indictable; quod fuit concess per Powell, and vid. 2 Rol. Rep. 78. 4 Ins. 181. In the report of the case of the *Queen v. Langley*, 3

[*199] an indirect scandal against the government to have *appointed an ignorant man to be a justice of the peace is

Ld. Ray. 1029, Gould, J. is reported to have said, that in Darby's case, 2 Mod. 139. the court held that the words were not indictable, yet the contrary appears, as well from the report, 3 Mod. 139, as from the reports of the same case, Comb. 65, and Carth. 14; in the latter of which it is stated that the defendant was fined 100 marks.

In the case of the King v. Penny, 1 Ld. Ray, 153, (8 and 9 W. III.) the defendant was indicted for saying of Mr. Martin, a justice of the peace, "I did not care if all the Martins had been hanged five years ago, and the justice is now turned out of the commission;" and the indictment was quashed, on motion, the court observing that Mr. Martin ought to have brought his action.

In the case of the King v. Revell, Str. 420, where the defendant was indicted for saying to a justice of the peace in *the execution of his office*, you are a rogue and a liar, it was held that an indictment lay; and the court, in giving judgment, observed "the true distinction is, that where the words are spoken in the presence of the justice there he may commit: but when it is behind his back, the party can be only indicted for a breach of the peace." And the court also held, that where the party might be committed he might also be indicted. But in the subsequent case of the King v. Pocock, Str. 1157, an information was moved for words spoken by the defendant in a conversation about a warrant which had been granted by Mr. Kent, a justice of the peace, in which the defendant having asked whether Mr. Kent was a sworn justice, and having been answered, "to be sure he is or else he would not act," replied "if he is a sworn justice he is a rogue and a forsworn rogue." Et per curiam, there ought to be no information; it is not the same insult and contempt as if spoken to him in the execution of his office which would make it a matter indictable.

In R. v. Weltje, 2 Camp. C. 142, the defendant was indicted for saying of a justice of the peace, *in his absence*, that he was a scoundrel and a liar. Lord Ellenborough, C. J. said, "the words not having been spoken to the justice, I think they are not indictable. This doctrine is laid down by Lord Holt, in a case in Salkeld (R. v. Wrightson 2 Salk, 698, and in R. v. Pocock, 2 Str. 1157;) the court of King's Bench refused an information for saying of a justice, in his absence, he was a *forsworn rogue*. However, I will not direct an acquittal on this point, as it is upon the record and may be taken advantage of in arrest of judgment. It will be for the jury now to say, whether the words were spoken of the prosecutor as a justice of the peace, and with intent to defame him in that capacity; for if they were not, the indictment is not supported, and it could not by possibility be a misdemeanor to utter them, although the prosecutor's name may be in the commission of the peace for the county of Middlesex." And the indictment must aver that the words were spoken to the justice in the execution of his office; R. v. Leafe, Andr. 226; and see Com. 46. Com. Dig. Ind. D. Carth. 14. R. v. Darby, Bac. Ab. tit. Information, 637. R. v. Langley, Holt's R. 654.

too remote to be satisfactory. But the *case might fall [*200] under a very different consideration if a magistrate were to be charged with some specific act of oppression or corruption in his judicial capacity. And it is clear that general abuse, in such cases, whether the magistrate be absent or present, is a sufficient ground for binding the offender to his good behaviour, or of indictment if the defamation be in writing.

Next, where the publication reflects upon the administration of justice.

Hurry (c) had summoned Watson, who was a member of a corporate body, into a Court of Request, to recover the sum of eleven shillings; Hurry was afterwards indicted by Watson for perjury, alleged to have been committed in the Courts of Requests, and was acquitted on the merits. Hurry then brought an action against Watson, for a *malicious* prosecution, in which he recovered £3000 damages, and the court refused to set aside the verdict. A majority of the corporation afterwards entered a resolution in their books, asserting, "That *Mr. Watson had been actuated by motives of public justice,*" and voted him the sum of £2300.

An information was applied for, one ground for which was, that the terms of the order constituted a high contempt of the administration of justice. On granting the information, [*201] Ashurst, J. observed, "The assertion that he was actuated by motives of public justice, carries with it an imputation on the public justice of the country; for if these were his only motives then the verdict must be wrong."

And Buller, Justice, "Nothing can be of greater importance to the welfare of the public than to put a stop to the animadversions and censures which are so frequently made upon courts of justice in this country; they can be of no service, and may be of the most mischievous consequences. Cases may happen in which the judge and jury may be mistaken; when they are, the law has afforded a remedy, and the party injured is entitled to pursue every method

See also the Queen v. Nun, 10 Mod. 186. 11 Mod. 166 12 Mod. 98, 514. Lord Holt held that, though an insolent witness might be committed by the court for a contempt, he could not be indicted. 7 Mod. 28.

(c) The King v. Watson and others, 2 T. R. 199.

which the law allows to correct the mistake ; but when a person has recourse to a writing like the present, by publications in print, or by any other means, to calumniate the proceedings of a court of justice, the obvious tendency of it is to weaken the administration of justice, and in consequence to sap the very foundation of the constitution itself."

An information had been filed by the Attorney-General, against White and others, for an abusive comment on the conduct of a judge and jury, by whom a person had lately been tried for murder and acquitted. Upon the trial of the defendants for the libel, [*202] Grose, J. informed the jury, that in *case they were of opinion that the publication had been made, not with a view to elucidate the truth, but to injure the characters of individuals and to bring into contempt the administration of justice in the country, they ought to find the defendants guilty (*d*).

The same policy which prohibits seditious comments on the King's conduct and government, extends to reflections on the proceedings of the two houses of Parliament. These bodies, so essential a part of the constitution, are at all events entitled to reverence and respect on account of the great and important public services which they are bound to discharge. They have exercised, from very early times, the means of repressing immediate insults and contempts of their authority, which are essential at least to their dignity, if not to their very existence ; nevertheless, they have been sparing in the exercise of their extensive and apparently undefined powers, and have, in many instances, waived their privileges, and delivered over offenders to be dealt with [*203] by the common law. It seems to have been the policy of the courts to encourage such a proceeding : and it is no less the duty of juries to pay a ready attention when proof of such insults is submitted to them.

(*d*) The Jury found them guilty, and they were sentenced to three years' imprisonment.

See also the case of the King *v.* Smith, Skinn. 124, where the charge was that the defendant had instructed Stephen Colledge to say on his trial at Oxford, that " Government might as well have hanged him at Tyburn, as brought him hither to murder him with a little more formality."

In the case (*e*) of *the King v. Rayner*, the defendant having been convicted of printing a scandalous libel upon the Houses of Lords and Commons, called "Robin's Reign, or Seven's the Main," the court set a fine of £50 upon him, committed him for two years, and until he should pay the fine, and likewise till he should find security for his good behaviour for seven years.

William Owen (*f*) was tried upon an information exhibited against him for publishing a malicious libel, entitled "The Case of the Honourable Alexander Murray, Esq. in an Appeal to the People of Great Britain," &c. tending to scandalize and vilify the whole body of the Commons in Parliament assembled; to represent the proceedings in Parliament as cruel, arbitrary, and oppressive; to make it believed that the Commons in Parliament assembled had acted, in their legislative capacity, in open violation of the constitution; and also to represent the said House of Commons as a court of inquisition, &c. &c.

*Upon the publication of this alleged libel by the de- [*204]
fendant, the Commons addressed the King, desiring his majesty to give orders to prosecute the publisher, which was (*g*) done.

After the impeachment of Mr. Hastings, a review of the articles of impeachment was published, by John Stockdale. Upon the suggestion of Mr. Fox, one of the managers of the impeachment, the House unanimously voted an address to the King, praying his majesty to direct his Attorney-General (*h*) to file an information against Mr. Stockdale, as the publisher of a libel upon the Commons. The Attorney General, on opening the case to the jury, after stating the address of the Commons, proceeded to observe, "I state it as a measure which they have taken, thinking it, in their wisdom, as every one must think it, to be the fittest to bring before a jury of their country an offender against themselves, avoiding thereby, what

(*e*) 2 Barnard. K. B. 293. Dig. L. L. 125.

(*f*) Michs. 25 G. 2. K. B. MSS. Dig. L. L. 67.

(*g*) He was tried before Lord C. J. Lee, and acquitted.

(*h*) Sir Archibald Macdonald, afterwards Lord Chief Baron of the Court of the Exchequer.

sometimes indeed is unavoidable, but which they wish to avoid whenever it can be done with propriety, the acting both as judges and accusers, which they must necessarily have done, had they resorted to their own powers, which are great and extensive, for the purpose of *vindicating themselves against insult and contempt, but which, in the present instance, they have wisely foreborne to exercise, thinking (*i*) it better to leave the offender to be dealt with by a fair and impartial jury."

In the case of *Burdett, Bart. v. Abbott* (*k*) it was held, on a consideration of all the authorities, that a commitment by the speaker of the House of Commons of the plaintiff, a member of the House, upon a resolution of the House that a printed paper, the printing of which had been authorised by the plaintiff, was a libel on the House, and that an order by the House that he should be committed on the speaker's warrant was legal (*k*).

(*i*) *Ridgway's Speeches of the Hon. T. Erskine.*

(*k*) 14 East. 1. Trespass against the speaker of the House of Commons for forcibly, and with the assistance of armed soldiers, breaking into the messuage of the plaintiff, (the outer door being shut and fastened,) and arresting him there, and taking him to the Tower of London and imprisoning him there; it was held to be a legal justification and bar to plead that a parliament was held which was sitting during the period of the trespasses complained of; that the plaintiff was a member of the House of Commons, that the house having resolved "that a certain letter," &c. (in *Cobbett's Weekly Register*,) was a libellous and scandalous paper, reflecting on the just rights and privileges of the house, and that the plaintiff (who had admitted that the said letter, &c. was printed by his authority) had been thereby guilty of a breach of the privileges

*of that house, had ordered that, for his said offence, he should be [*206] committed to the Tower, and that the speaker should issue his warrant; and that accordingly the defendant, as speaker, in execution of the said order, issued his warrant to the serjeant at arms, to whom the execution of such warrant belonged, to arrest the plaintiff and commit him to the custody of the lieutenant of the Tower; and issued another warrant to the lieutenant of the Tower to receive and detain the plaintiff in custody during the pleasure of the House, by virtue of which first warrant the serjeant at arms went to the messuage of the plaintiff where he then was to execute it; and because the outer door was fastened, and he could not enter, after audible notification of his purpose and demand made of admission, he by the assistance of the said soldiers broke and entered the plaintiff's messuage, and arrested and conveyed him to the Tower, where he was received and detained in custody under the other war-

rant by the lieutenant of the Tower. See also Mr. Holt's Treatise on the Law of Libel, 2nd Edition, p. 132, and the authorities there collected.

Note.—Scandalous reflections upon the grandees of the realm fall within the division of the subject which has been considered in this chapter; but since the proceeding by writ of Scandalum Magnatum is of a civil as well as of a criminal nature, the extent of the injury has been treated of in a previous chapter, vol. I. c. 6.

CHAPTER IX.

PUBLICATIONS EXCITING TO AN ILLEGAL ACT.

[*207] *LASTLY, the mischievous quality of the communication may consist in its tendency to excite an individual to the commission of some illegal act.

This offence may consist either in a direct solicitation, or in the holding out some indirect but forcible motive to the commission of such an act.

In the cases of high treason and misdemeanors, all advisers are considered as principals, and are identified with them as to all penal consequences. In petit treason (*a*) and felonies, a procurer by solicitation or advice is punishable as an accessory before the fact; and by many statutes creating new offences, counsellors, aiders, and abettors, are subjected to specific punishments.

And where the solicitation is not followed by the actual commission of the offence contemplated, it is perfectly clear that [*208] the adviser is liable to *be (*b*) punished for his wilful attempt to violate the law, through the agency of another.

And secondly, the holding out any indirect but forcible motive, to induce the commission of an illegal act, is in itself indictable. Thus it is not only illegal to send a challenge to fight, but even an attempt to provoke (*c*) another to send such a challenge is a misdemeanor,

(*a*) 1 Hale's P. C. 615.

(*b*) R. v. Phillips, 6 East. 464. R. v. Southerton, 6 East. 126. R. v. Higgins, 2 East. 5.

(*c*) By 22 G. II. c. 23, "If any person, on board the fleet, shall use reproach-

since the endeavor is an act done towards the accomplishment of the offence (*d*).

With respect to communications tending to acts of personal violence, there is an important distinction between words spoken and written, or printed publications; the former are not indictable, though they be scurrilous, and reflect upon the character of an individual, or even be addressed personally to him, unless they (*e*) amount to a direct *solicitation to a breach of the peace, [*209] as by a challenge to fight. The defendant (*f*) said the mayor of Salisbury, “ You, Mr. Mayor, are a rogue and a rascal ;” and it was held, after great deliberation, that the words were not indictable, since they were not spoken to him in the execution of office; that if they had been put into writing they would have constituted a libel, which would have supported either an indictment or an action; but that they were but loose or unmannerly words, like those spoken of an alderman of *Hull—“ When he [*210] puts on his gown, Satan enters into it,” which were ad-

ful or provoking speeches or gestures, tending to make any quarrel or disturbance, he shall, upon being convicted thereof, suffer such punishment as a Court Martial shall impose.

(*d*) 6 East. 464.

(*e*) 6 Mod 125. *Ld. Ray.* 1030. The terms *liar* and *rogue* are not indictable when spoken, because (as is said) they do not immediately tend to a breach of the peace, 4 Ins. 181.

Notwithstanding this authority, it would not be easy to select two other words in the language which do so efficaciously tend to a breach of the peace, or which have, in fact, been so frequently the forerunners of blows, as the two alluded to. The reason for tolerating such oral but tempting incitements to violence, seems to be well grounded apprehension, that, to subject the speakers of abusive words to punishment, would be to cherish a spirit of petty litigation, the inconvenience of which would outweigh the mischief intended to be remedied. The experiment was made with respect to actions (vol. i. p. 22.), but the judges were quickly induced to abandon the rule they had laid down, which does not seem ever to have been extended in the same latitude to the criminal offence; and Lord Holt observed, that to encourage indictments for words would render them as uncertain as actions for words are. *Supra* 197.

By st. 9 Ann. c. 14, s. 8, in case any person shall challenge another, or provoke him to fight, on account of money won at play, he shall, upon conviction, forfeit all his goods and chattels and personal estate whatsoever, and shall suffer imprisonment for two years. See *Haw. P. C.* b. 1, c. 72, s. 42.

(*f*) *The Queen v. Langley*, 6 Mod. 125.

judged to be not indictable ; and Holt, C. J. said, that words directly tending to a breach of the peace, may be indictable ; but otherwise, to encourage indictments for words, would make them as uncertain as actions for words are.

But it seems to be perfectly settled, that any malicious defamation of any person, expressed in print or in writing, or by means of pictures or signs, and tending to provoke him to anger and acts of violence, or to expose him to public hatred, contempt, or ridicule (g) amounts to a libel in the indictable sense of the word. And

since the reason is, that such publications create ill blood, [*211] and manifestly tend to a disturbance of *the public peace, the degree of discredit is immaterial to the essence of the libel, since the law cannot determine the degree of forbearance which a party reflected upon will exert before he is excited and provoked to acts of outrage, and therefore prohibits equally all imputations conveyed by such means, and possessing such a tendency.

The grounds of the distinction between oral and written provocation, are to be sought after in practical wisdom and experience, rather than in principle, inasmuch as the tendency to produce illegal violence is oftentimes stronger in the former case than in the latter : for instance, contumelious and insulting language is more likely to inflame the party to whom it is applied, to acts of outrage, when it is uttered publicly in his hearing, than if even the same expressions were to be conveyed to him by a private letter, when the insult would be divested of its main aggravation,—its publicity,—and the distance of the offended party from the aggressor would allow any irritation which was created an opportunity to subside, without vent-

(g) 3 Black. Com. 150. Haw. Pl. Cr. c. 73. s. 1. 5 Co. 125. 5 Mod. 165. Salk. 418. Str. 422, 791. 12 Mod. 221. Ld. Ray. 416. 1 Sid. 270. Supra, v. i. c. 5.

As every person desires to appear agreeable in life, and must be highly provoked by such ridiculous representations of him as tend to lessen him in the esteem of the world, and take away his reputation which, to some men, is more dear than life itself ; it has been held, that not only charges of a flagrant nature and which reflect a moral turpitude on the party, are libellous, but also such as set him in a scurrilous ignominious light, whether expressed in printing, or writing, or by signs, or pictures, for these equally create ill blood and provoke the parties to acts of revenge and breaches of the peace. Bac. Ab. tit. Libel. A. 2.

ing itself in an act of violence. It seems that, in general, where a defamatory libel reflecting on the character of an individual will support an action for damages, the publication of it amounts to an indictable offence, inasmuch as it *tends to [*212] provoke animosity and violence, and to disturb the peace of society (*h*).

An indictment (*i*) also lies for a libel reflecting upon the memory of a person who is dead, if it be published with the malevolent purpose to injure his family and posterity, and to expose them to contempt and disgrace; for the chief (*k*) cause of punishing offences of this nature, is their tendency to a breach of the peace; and although the party be dead at the time of publishing the libel, yet (according to Lord Coke) it stirs up others of the same family, blood, or society, to revenge, and to break the peace.

In the case of the *King v. Chrichley* (*l*), an information was granted against the defendant, for publishing the following libel, reflecting upon Sir C. Gaunter Nicoll, Lady Dartmouth's father, and on the government: "On Saturday evening died of the small pox, Sir C. G. Nicoll, Knight of the *most honour. [*213] able order of the bath, and representative in Parliament of the borough of Peterborough. He could not be called a friend to his country, for he changed his principles for a red ribband, and voted for that pernicious project, the excise." But, as was observed by Lord Kenyon, C. J. in the case of the *King v. Topham* (*m*), "To say that the conduct of a dead person can at no time be canvassed; to hold that, even after ages are past, the conduct of bad men cannot be contrasted with that of the good, would be to exclude the most useful part of history." The malicious intention of the defendant, therefore, to injure the family and posterity of the deceased, must be expressly averred and clearly proved.

(*h*) Skinn. 123. 2 Wils. 204. Com. Dig. tit. Libel, c. 3. Bac. Ab. tit. Slander, 202. 3 Bl. Com. 125. 2 Camp. R. 511, and, therefore as to the extent of the offence, see Vol. I. c. 5. p. 148. In some instances an indictment lies for words which would not support an action. See Com. Dig. Ind. D. R. v. Darby, 3 Mod. 139.

(*i*) 5 Co. 125. Haw. Pl. Cr. c. 73. s. 1. The *King v. Topham*, 4 T. R. 126.

(*k*) Haw. Pl. Cr. c. 73. s. 3. 5 Co. 125. R. v. Walter, 2 Esp. C. 51.

(*l*) 4 T. R. 129, in the notes.

(*m*) 4 T. R. 129.

And it is not necessary that the libel should reflect upon the character of any particular individual (*n*), provided it immediately tend to produce tumult and disorder.

*An information was prayed against the defendant for publishing a paper containing an account of a murder committed [*214] upon a Jewish woman and her child, by certain Jews lately arrived from Portugal, and living near Broad-street, because the child was begotten by a Christian; and the affidavit set forth, that several persons mentioned therein, who were recently arrived from Portugal, and lived in Broad-street, had been attacked by multitudes, in various parts of the city, barbarously treated, and threatened with death, in case they were found abroad any more; and it was objected, that no information could be granted, because it did not appear, in particular, who the persons reflected upon were. But by the court, "Admitting that an information for a libel may be improper, yet the publication of this paper is deservedly punishable in an information for a misdemeanor, and that of the highest kind; *such sort of advertisements neces- [215] sarily tending to raise tumults and disorder among the people, and inflame them with an universal spirit of barbarity, against a whole body of men, as if guilty of crimes scarcely practicable, and wholly incredible (*o*)."

(*n*) 3 Bac. Abr. 494. 2 Barnard. K. B. 138. 166. *The King v. Osborne*, D. L. L. 79.

An indictment for a libel on several persons, to the jurors unknown, is bad. *R. v. Orme* (or *Alme*,) and *Nut. Ld.* Ray. 486. 3 Salk. 224.; but a libel upon one of a body of persons without naming him, is a libel upon the whole, and may be so described. The defendant published the following advertisement in a newspaper: Whereas an East India Director has raised the price of green tea to an extravagant rate, the same gentleman being also concerned with the Swedish East India Company; the English proprietors hope he will find some measures to raise bohea tea in Sweden, that the Company may have an opportunity to ship off some of their bad bohea tea, instead of having it burnt as usual." Upon motion for an information, Lee, C. J. observed, "Where a paper is published, equally reflecting upon a number of people, it reflects upon all, and readers, according to their different opinions, may apply it so." *R. v. Jenour*, 7 Mod. 400. An information has been granted for charging one of several trustees with a breach of trust. *R. v. Griffin*, Rep. T. H. 39. See below tit. Information.

(*o*) *R. v. Osborne*, 2 Kel. 230. pl. 183. 2 Barnard. K. B. 138, 166. and see below tit. Information.

CHAPTER X.

PUBLICATIONS AGAINST SOUND POLICY AND CONVENIENCE.

*NEXT, every publication is intrinsically illegal which tends to produce any public inconvenience or calamity. Under this division, those rank highly, in respect of the magnitude of their results, which tend to disturb the amicable relations which subsist between this and other nations, by malicious reflections upon those who are possessed of high rank and influence in foreign states. As the natural tendency of these is to involve the government in a foreign war, their authors have, in several instances, been punished as offenders at common law. Thus, in the case (*a*) of the *King v. D'Eon*, an information was filed against the defendant by the Attorney-General (*b*), for publishing a libel upon the Count de Guerchy, who was at that time residing in this kingdom, in the capacity of ambassador from the court *of France. The information charged the defendant [*216] with an intention to defame the character and abilities of the Count de Guerchy; to render him ridiculous and contemptible; to arraign his conduct and behaviour in his character of ambassador; and to cause it to be believed that he had, after his arrival in this kingdom, been guilty of unjust, unwarrantable, and oppressive proceedings towards the defendant and his friends; and to insinuate, that he was not fit or qualified to execute the office and functions of

(*a*) Easter T. 4 G. 3. 1764. K. B. MSS. Dig. L. L. 88.

(*b*) Sir Fletcher Norton.

ambassador. The defendant was convicted.—Lord George Gordon (*c*) was found guilty upon an information, for having published some severe reflections upon the Queen of France, in which she was represented as the leader of a faction; and Mr. Justice Ashurst, in passing sentence, observed, that unless the authors of such publications were punished, their libels would be supposed to have been made with the connivance of the state. The defendant, John Vint (*d*), was found guilty upon an information charging him with having published the following libel, “The Emperor of Russia is rendering himself obnoxious *to his subjects, by various acts of [*218] tyranny; and ridiculous in the eyes of Europe, by his inconsistency; he has lately passed an edict to prohibit the exportation of deals and other naval stores. In consequence of this ill-judged law, a hundred sail of vessels are likely to return to this country without their freight;” with intent to traduce the Emperor of Russia, and interrupt and disturb the friendship subsisting between that country and Great Britain.

Jean Peltier was found guilty upon an information, charging him with having published a malicious libel, with intent to vilify Napoleon Bonaparte, the Chief Consul of the French Republic, and to excite and provoke the citizens of the said republic to deprive the said Napoleon Bonaparte of his consular dignity, and to kill and destroy him, and to interrupt the friendship and peace subsisting between our Lord the King and his subjects and the said Napoleon Bonaparte and the French republic. The most obnoxious passages of the libel were these: “O! eternal disgrace of France;—Cæsar, on the Banks of the Rubicon, has against him in this quarrel, the Senate, Pompey, and Cato; and in the plains of Pharsalia, if fortune is unequal, if you must yield to the destinies, Rome in this sad reverse at least remains to avenge you a poignard among the last Roman.” “As for me, far from envying *his (Bona- [*219] parte’s) lot, let him name (I consent to it) his worthy successor; carried on his shield, let him be elect-

(*c*) Hil. 28 G. 3. The defendant was sentenced to pay a fine of £500, to be imprisoned in Newgate for the space of two years, and afterwards to give security for his good behaviour for the space of fourteen years.

(*d*) 40 G. III.

ed Emperor. Finally (and Romulus recalls the thing to mind), I wish that on the morrow he may have his apotheosis. Amen!"—Upon the trial, Lord Ellenborough, C. J. referred to the cases of Lord George Gordon and Vint, and said, "I lay it down as law, that any publication which tends to disgrace, revile, and defame persons of considerable situations of power and dignity in foreign countries, may be taken to be and treated as a libel; and particularly where it has a tendency to interrupt the amity and peace between the two countries."

By the statute 35 H. VIII. c. 14 (*e*), it is made felony to declare any false prophecy upon occasion of arms, fields, or letters.

By st. 5 Eliz. c. 15, "If any person advisedly and directly advance, publish, or set forth by writing, printing, signing, or any other open speech or deed, to any person or persons, any fond, fantastical, or false prophecy, upon or by the occasion of any arms, fields, beasts, badges, or such other like things accustomed in arms, cognizances, or signets, or upon or by reason of any time, year, or day, name, bloodshed, or war, to the intent thereby to make any rebellion, insurrection, *dissension, loss of life, [*220] or other disturbance, within the realm, &c. upon the first conviction he shall suffer one year's imprisonment, and pay a fine of £10, and, for a second offence, shall suffer imprisonment during life, and forfeit all goods and chattels, real and personal. But it is provided, that no one shall be impeached for any offence against the act, unless within six months after the offence committed (*f*).

It has been from early times considered as an offence at Common Law, to attempt by means of false rumours, to raise the price of provisions, or other necessities of life.

In 43 Ass. (*g*) it was presented that a Lombard did procure to promote and enhance the price of merchandize; and the Lombard demanded judgment of the presentment for two causes—1. That it

(*e*) See also 3 and 4 Ed. VI. and 7 Ed. VI.

(*f*) By 23 Eliz. c. 2, it was made felony to cast the nativity of the Queen, or to seek to know and set forth how long the Queen shall live, or who shall reign after her decease, or to utter any false prophecies to any such intent, or to wish or desire the death or deprivation of the Queen. (*g*) P. 38.

did not sound in forestalling;—2. That of his endeavour, or attempt by words, no evil was put in ure, that is, no price was enhanced; but both objections were overruled; “Whereby,” says [*221] Sir E. Coke (*h*), it appears that the attempt by *words to enhance the price of merchandize, was punishable by law, and did sound in forestalment.

And from (*i*) the same report it appears, that to attempt by such rumours to diminish the price of any staple commodity, to the prejudice of the dealers in general, is likewise an offence at common law; for it is there said, “Knivet reported that certain people came to Coteswold, in Herefordshire, and said, in *deceit* of the people, that there were such wars beyond seas, as no wool could pass or be carried beyond seas, whereby the price of wool was abated; and upon presentment thereof made, they appeared, and upon their confession, they were put to fine and ransom.”

And in (*k*) Mich. term, 39 and 40 Eliz. it was, after conference and mature deliberation, resolved by all the justices, that every practice or device, by act, conspiracy, words, or news, to enhance the price of provisions, or other merchandize, was punishable by law.

An information (*l*) was filed, charging the defendant, that he, intending to enhance the price of hops, did, at Worcester, in the hearing of divers hop dealers and planters, declare, that the then present stock of hops was nearly exhausted, and would [*222] be exhausted before the crop of hops *then growing could be brought into the market; and that there would soon be a scarcity of hops, with intent and design, by such rumours and reports, to induce dealers in hops not to carry any to market for sale. When the defendant (*m*) was brought up to receive judgment, his counsel objected that the counts charging him with having

(*h*) 3 Ins. 196.

(*i*) 43 Ass. p. 38.

(*k*) 3 Ins. 196. Bro. Ind. pl. 40.

(*l*) R. v. Waddington, 1 East. 143.

(*m*) He was convicted before Mr. J. Le Blanc, at Worcester, and when brought up to receive sentence, the court out of mere indulgence, allowed his counsel to go fully into the case, saying, that if it appeared that judgment ought to be arrested, or a new trial granted, the defendant should not be precluded from the advantage

spread rumours to enhance the price of hops, did not aver (*n*) that the rumours were false ; and that it should at least have been stated that the price of the commodity had, in fact, been raised by the rumours. But there were other counts in the information, charging the defendant with engrossing large quantities of hops, with intent to prevent the same from being brought to market, and to re-sell the same at an exorbitant profit, and thereby greatly to enhance the price of hops ; and the defendant was adjudged to pay a fine of £500 and to be imprisoned for one month.

The court does not, in the above case, appear to have given an express opinion upon the indictable quality of the offence described in the first two counts, which consisted in the spreading *rumours generally, with intent to enhance the price ; [*223] nor was this necessary, since the information contained independent charges which were deemed sufficient, and upon which the judgment appears principally to have been founded. It was contended by the counsel for the prosecution, that “ the spreading rumours, whether true or false, if done with a mischievous intent, to produce a public detriment, is indictable upon general principles of law, in the same manner as publishing a libel, however true the facts stated may be ; and that, in *Jolliffe's* case (*o*), the endeavoring to procure certain persons to be appointed overseers, was held to be criminal, though the criminalty consisted in the intent only, which was to derive a private advantage.” It seems, however, to be clear, that no malice will render an act indictable, which is in itself innocent and legal ; the question therefore is, whether the publication of real facts (the knowledge of which may affect the price of provisions or of merchandize) can be considered as detrimental to the community ; if it can, then a mischievous intention (that is malice) in the absence of rebutting evidence, is to be presumed ; if it cannot, no malice, as it seems, can render it criminal. In many cases, the publication of such facts would rather affect the interests of individuals, than *those of the community. [*224] If, for instance, a person were truly to publish, that the foreign markets were so glutted with a particular commodity, that British wares, of the same description, could not be sold there, the

(*n*) See Haw. P. C. c. 80, s. 1.

(*o*) 4 T. R. 285.

report might operate to the immediate prejudice of the holders of that article ; but the prejudice to the public, namely, their exclusion from the foreign market, would be attributable purely to the superfluity which prevailed there, and not to the communication made by the defendant.

It is said to have been resolved by all the judges, that all writers of *false news* (*p*) are indictable and punishable ; and, probably, at this day the fabrication of news likely to produce any public detriment would be regarded as criminal and punishable.

In the case of the *King v. De Berenger and others* (*q*), it was held to be an indictable offence to conspire to raise the price of the public funds by means of *false rumours*, the end as well as the means being illegal.

(*p*) 4 Read. St. L. Dig. L. l. 23.

(*q*) 3 M. & S. 67, the false rumour was that N. Bonaparte the then ruler of France, with whom Great Britain was at war, was dead ; and it was laid to have been done with intent to injure and aggrieve all the subjects of the king who should, on the 21st day of February, 1814, (the day of spreading the rumour) purchase any share in the public government funds.

CHAPTER XI.

OF THE ACT OF PUBLICATION.

*THE plaintiff, to entitle himself to damages in a civil [*225] action, must, as has been seen, shew a publication made by the defendant, with a wrongful intention; and whatever has been said upon that subject applies equally to the criminal proceeding, with this addition, that the sending of a libel to the individual reflected on, without exposing the contents to a third person, is a sufficient publication to support an indictment, on account of its tendency (*a*), to provoke that individual to commit a breach of the peace.

According to the general rule of law, it is clear that all who are in any degree accessory to the publication of a libel, and by any means whatever conduce to the publication, are to be considered as principals in the act of publication: thus if one suggest illegal matter, in order that another may write or print it, and that a third may publish it, all are equally amenable for the act of publication, when it has been so effected. *But what, [*226] if no publication has taken place, is the mere making of a libel, or the possession of it when made by another, a crime by the law of England.

Ld. Coke, in the fifth report *De Libellis Famosis*, resolution 4, after describing the different species of libels, immediately proceeds to point out the different modes of publication; and then observes,

(*a*) 1 Will. Saun. 132, n. 2. 2 Esp. R. 226. 5 Mod. 163. 12 Co. 35. 1 Hob. 62, 215.

“It was resolved in the Star Chamber, in *Halliwood's* case, that if one find a libel (and would keep himself out of danger), if it be composed against a private man, the finder either may burn it, or presently deliver it to a magistrate; but if it concern a magistrate or other public person, the finder ought presently to deliver it to a magistrate.” It does not very clearly appear, whether this procedure was prescribed as a strictly legal or merely as a moral duty and matter of prudence, since the phrase, “if he would keep himself out of danger,” is abundantly ambiguous. This doubt, however, is in some degree removed by reference to the civil law, whence the doctrine is said to have been derived; according to which it seems, that the finder of a *libellus famosus* was not punishable for the mere keeping of it in possession, but for the improper publication of it.

Si quis famosum libellum sive domi sive in publico vel in quocunque loco ignarus offenderit, aut discerpit priusquam alter [*227] inveniatur, aut nulli confiteatur *inventum; nam quicumque obtulerit inventum, certum est ipsum reum ex lege retinendum, nisi prodideret auctorem: nec evasurum pœnas hujusmodi criminibus constitutas, si proditus fuerit cuiquam retulisse quod legere (b).

By the edicts of the Emperors Valentinian and Valens:

“Si quis famosum libellum ignarus repererit (c), aut corrumpat priusquam alter inveniatur, aut nulli confiteatur inventum. Si vero non statim easdem chartulas corruerit vel igne consumpserit, sed earum vim manifestaverit, sciat se quod auctorem hujusmodi delicti capitali sententiæ subjugandum.” Again in the Codex Justinianus de famosis libellis, “Famosis libellis si quis scripserit quod pertineat ad injuriam alterius (d), de quâ est publica accusatio et pœna capitalis, non tantum in auctorem famosi libelli, sed etiam in eum qui invenit nec combussit sed *evulgavit*; quia iste auctor præsumitur esse libelli, qui eum *sparsit in vulgus* non prodito auctore.”

Hence it may be collected, that the finder of a libel was not punishable for the mere keeping of it in custody, but for its subsequent publication; and therefore it seems that the passage in [*228] the resolution *cited, was intended rather as a caution

(b) Theod. Cod. Lib. 9, tit. 34.

(c) Cod. Lib. 9, tit. 36.

(d) Ib. tit. 36.

against the effects of a publication, which a party risked by keeping the libel in possession, than a declaration that the keeping of it in possession was in itself a temporal crime.

With respect to the Star Chamber practice, that court does not appear to have ever punished for the mere possession of a libel; on the contrary, as will afterwards be noticed, their jurisdiction was considered to be doubtful, even where there had been a publication by sending a libel to the party defamed,—a doubt which never could have been entertained, had the power of that court to punish for mere possession, been considered as clearly established. But this offence, if it ever existed as such against the law of the country, probably did not survive the court which created it.

An information (*e*) was exhibited against the defendant, for causing to be framed, printed, and published, a scandalous libel. Upon evidence it appeared, that two printed libels had been found at the lodgings of the defendant, upon warrants from the principal Secretary of State to search there. The opinion of the court was, that this was no crime within the information, though he gave *no account how they came there; and that the having [*229] a libel in possession without delivering it to a magistrate, was punishable in the Star Chamber only. In the subsequent case of the *King v. Beare*, Lord Holt C. J. is reported to have said, that the collecting and transcribing of libels (*f*), for the purpose of publishing them, is criminal, though no publication should ever take place; since men ought not to be allowed to have such evil instruments in their keeping. But in another report of the same case, the defendant having been found guilty of *writing and collecting* certain libels, it was said, that the *collecting* had been better out of the case (*g*); and it is clear that judgment was given on the ground that the defendant wrote the original libel, since though Lord Holt intimated that the bare copying of a libel was criminal, he said there was no necessity for the opinion, because the defendant had been found guilty of writing the original (*h*).

(*e*) Vent. 31. E. 21. C. 2. 15 Vin. Ab. 89, pl. 6. Dig. L. L. 19.

(*f*) Carth. 409. Holt R. 422.

(*g*) Salk. 417. Ld. Ray. 414.

(*h*) 2 Salk. 419.

Upon the different reports of this case, Lord Camden remarked :
 " If all this be law, and I have no right at present to deny it,
 whenever a favourite libel is published, the whole king-
 [*230] dom in a month or two becomes criminal, and it would *be
 difficult to find one innocent jury amongst so many
 millions of offenders (i)."

With respect to the bare fact of committing libellous matter to print or writing, the nature of the act appears to be much more doubtful ; since, though it has been expressly decided that the bare act of writing, without publication, is criminal at common law, the grounds of that determination afford room for doubt.

Under the jurisdiction of the Court of Star Chamber, some publication appears to have been held essential to the completion of the offence ; since even in cases where libels had been sent to the individuals libelled, it was doubted whether the Court had jurisdiction—a question which never could have been raised, had the mere act of writing been sufficient to complete the offence.

Thus, in the case (k) of *Dr. Edwards and Dr. Wooton*, the letter had been written to Dr. Edwards himself, and it was said, that the latter should be punished, (although it was
 [*231] solely writ to the plaintiff without any other *publication,) in the Star Chamber, for that it was an offence to the King, and a great motive to revenge. And the same question occurred in the case of *Barrow v. Llewellyn* (l), where the letter had been sent sealed to the prty, as also in the case of *Sir Baptist Hicks* (m) and no instance appears, in which the Star Chamber punished for a libel without some publication.

In the case of *Lewis Pickering* (n), in the Star Chamber, the defendant confessed the *publishing* as well as the composing of the libel ; and in the resolutions which are subjoined to the case, no hint is given that the mere making of a libel without a publication

(i) 11 St. Tr. 322. The case of the King v. Rosenstein, 2 C. & P. Ni. Pri. Ca. 414. Park, J. thought it highly doubtful whether the having in possession an obscene libel with intent to publish it was an indictable offence.

(k) 12 Co. 35. 5 J. 1.

(l) 1 Hob. 62. 13 J. 1.

(m) Hob. 215.

(n) 5 Co. 125. 3 J. 1.

would be punishable in that court: on the contrary, the reasons for punishing the offence of libelling are expounded, and are such as can apply to those cases only in which a libel has been actually published: and in the 4th resolution, after the explanation given of the different kinds of libels, the various modes of publication are immediately specified.

In *Lamb's* case (o) the bill was exhibited against the defendants for the *publication* of two libels; and it was resolved, "that every one who *shall be convicted in the said [*232] case, either ought to be a contriver of the libel, or a procurer of the contriving of it, or a malicious publisher of it, knowing it to be a libel;" the resolution then goes on to expound, what shall amount to a publication, and afterwards repeats, that every one who shall be convicted, ought to be the contriver, procurer, or publisher of it, knowing it to be a libel. Upon the face of this resolution it appears to be doubtful, whether the contriver and procurer were considered as severally punishable for their acts, though no publication should take place; or whether the resolution does not suppose, in the first place, that the offence has been completed by a publication, and then proceeds to define what degree of agency shall render any party concerned responsible for the whole effect produced. In favour of the former construction it appears, that the actors are separately and disjunctively enumerated as liable to be convicted; and this interpretation was adopted by Lord Holt. In support of the latter construction, it may be observed, that the words, "every one who shall be convicted in the said case," refer immediately to the case of the defendants, who were prosecuted for *publishing* two libels; that in the subsequent part of the resolution it is said, "If the defendant write a copy of a libel, and do not publish it to others, it is no publication;" which affords some *reason for inferring, that a publication was deem- [*233] ed to be in all cases necessary before any conviction could take place; since the passage, if understood in this sense, that a person who commits a libel to writing is not punishable, unless he afterwards publish it, is sensible and intelligible; but if, on the other hand, the construction be this, that a person who writes a

(o) 9 Rep. 59. 8 J. 1.

libel, but does not publish it, is not punishable as the publisher, but is nevertheless liable as the contriver, as was contended for in the case *King v. Beare*,—then the passage is a piece of idle tautology, and amounts to no more than this, that a person, who does not publish a libel which he has written, is not guilty of a publication. The resolution afterwards proceeds to say, “but it is great evidence that he published it, when he, knowing it to be a libel, wrote a copy of it.” Upon which it may be observed, that the resorting to presumptive evidence, by making the act of writing proof of publication, would be nugatory, if that act of itself constituted a distinct and substantive offence.

Samuel Paine, a minister, was tried upon an information (*p*), setting forth that he was the composer, author, and publisher of a malicious libel against the late Queen Mary, styled “Her [*234] Epitaph.” *The jury found, by way of special verdict, that a certain person, to them unknown, did pronounce, dictate, and repeat the words contained in the libel which the defendant did write; and if that will make him guilty of the composing and making of the libel, then they find him guilty, and as to the publication, they find him not guilty. After argument the Court observed, “the making of a libel is an offence, though never published; and if one dictate and another write, both are guilty of making it; to what purpose should any one *write* or *copy* after another, but to shew his approbation of the contents of a libel, and the better to enable him to keep it in his memory, and repeat the contents of it to others.” The matter was, however, adjourned, and it does not appear that any judgment was given.

The defendant *Beare* (*q*) was found guilty of *writing* and *collecting*, but acquitted of the making and composing of several libels stated in the indictment. Upon motion in arrest of judgment, Holt, C. J. said, “Before I come to the objections against the verdict, I shall consider whether it be not criminal to *write* a libel, [*235] although a man be not the composer or contriver *thereof.” The learned judge observed, that it is the putting

(*p*) 5 Mod. 163. 1 Salk. 281. Comb. 358. Carth. 405. 1 Ld. Ray. 729. Holt, 294.

(*q*) Ld. Ray. 417. Carth. 409. 12 Mod. 219. 2 Salk. 417.

of the words into writing, which is the essence of the offence ; for the party is not guilty unless he put the words into writing ; and that in all cases where a man does an act, which act causes the thing to be what it is, such an one is to be considered the doer of it ; that in all lower offences procurers are principals, so that if A. hold B. whilst C. beats him, A. is guilty of the battery ; that *Lamb's* case was to be expounded by the same case in *Moor (r)*, in which it was reported to have been resolved, that the writer of a libel is, in law, the contriver ; but that in *Lamb's* case the question was not concerning the writing or making, but about the publication thereof, and it was held, that the writing of a copy of a libel, as indeed the writing of the original libel itself, is no publication thereof, but only an evidence of publication ; that the question was not how far the writing of a libel was criminal, but whether the writing of a copy be a publication, which indeed it is not ; that the case of *John De Northampton* is apposite, who was charged with writing only, without any mention made of publication, and who confessed the writing only. The learned judge also expressed his opinion, that the copying of a libel was a libel, *because it comprehends [*236] all that is necessary to make it a libel, the same scandalous matter, and the same mischievous consequences ; since it is by this means perpetuated, and may come to the hands of other men, and be published after the death of the copier ; and that if men might take copies of them with impunity, then the printing of them would be no offence, and then farewell to government.

Turton and Rokeby, Justices, were of the same opinion, and referred to several cases (s), to prove that writing a libel without publishing it, was punishable in the Star Chamber.

The parallel drawn by Lord Holt, in the above case, seems to be objectionable, since it assumes the offence to have been completed. If A. hold B. whilst C. beats him, A. is guilty of the beating, but the offence, that is, the battery, here is completed ; to suppose then, that the case in question is analogous to it, is to assume that the offence of libelling is complete without a publication ; the question was not whether an aider or abettor to an offence actually committed was punishable as a principal, but whether any offence had in fact been

(r) 813.

(s) Hob. 62, 215. 12 Co. 35.

consummated, or the whole rested in mere intent and
 [*237] preparation, as if A. had supplied *C. with a stick for the purpose of beating B., but no battery had actually taken place.

Neither do the cases relied upon appear to be applicable: in that of John De Northampton (*t*) it is stated, that the letter *was written* to John Ferrers, one of the King's counsel; and the confession runs thus: "*Et quia prædictus Johannes cognoscit dictam literam per se scriptam Roberto de Ferrers &c.;*" now if "written to" merely imported the address of the letter, which never passed from the defendant, there was no occasion to confess the writing of it to Robert de Ferrers, and the very same terms "written to" are used by Sir E. Coke, in his 12th Report, to imply a sending as well as writing.

The cases cited by Turton and Rokeby (*u*), Justices, are inapplicable; since in those instances there was a *publication* of the libel to the party defamed.

Knell (*x*) was tried upon an information charging him with having printed and published a libel, entitled "Mist's Weekly Journal." It was proved that the defendant was a printer's servant, and his business was to prepare the type for printing off, which
 [*238] business was called composing *for the press; that the defendant and another composed together the libel in question, taking the alternate columns. For the defendant it was objected, 1. that since the defendant took a distinct part, that which he composed could not bear the construction put upon the whole; and 2dly, that since he composed only, he could not be found guilty of the printing wherewith he was charged. It was answered that, in misdemeanors, an accessory in part is a principal in the whole, and, therefore, as the defendant assisted in the composing, a circumstance essential to the printing, he, by, that act, made himself concerned in the whole; that composing was taking a copy in types, which would make the defendant a publisher, since it had often been determined that the taking of a copy of a libel was an act of publication. But the Chief Justice directed the jury to acquit the defendant of

(*t*) 3 Ins. 174.

(*u*) Hob. 62, 215. 12 Co. 35.

(*x*) Hill 3. G. 9. Barnard. K. B. 305. D. L. L. 25.

the publication, and if they believed the evidence, to find him guilty of the printing, which they did accordingly (*y*).

*Upon the whole, whatever doubt may exist as to the [*239] criminal nature of the act, where it is confined to the mere writing, printing, or preserving of a libel, it seems to be perfectly clear that every person who maliciously lends his aid to the construction of a libel, subsequently published, or who contributes to the publication of one already made, with a knowledge of its contents, is indictable as a principal for the whole mischief produced.

And according to the doctrine laid down in *Lamb's case* (*z*), where a libel has been published, proof that the defendant committed it to writing, or, by parity of reasoning, did any other act contributing to its existence, is great evidence that he published it, unless he can satisfactorily explain the motive of his act.

(*y*) The defendant was afterwards sentenced to stand upon the pillory twice and to be kept to hard labour in Bridewell for the space of six months. D. L. L. 124. In *Sir Francis Burdett's case*, Holroyd, J. expressed an opinion that the composing and writing of a libel with the intent afterwards to publish it, amounted to a misdemeanor. In that case there was an actual subsequent publication by the defendant, and it was held, by a majority of the Judges, that there was a sufficient publication within the county where the defendant had composed and written the libel.

(*z*) 9 Co. 59.

CHAPTER XII.

OF THE DEFENDANT'S INTENTION, AND COLLATERAL CIRCUMSTANCES.

[*240] *AFTER the observations which have already been so frequently made on the subject of *intention*, little remains to be said.

In point as well of principle as of precedent, *malice* is essential to the offence constituted by any illegal communication (*a*).

This, however, considered as an universal rule, must be understood of malice in its legal and technical sense, as denoting in cases where the act itself is injurious and unlawful, the absence of legal excuse; for in the failure of circumstances which justify, excuse, or at least modify the act, a rational being must, in law as well as morals, be taken to contemplate and intend the immediate and natural consequences of his act.

[*241] *Where a party is instrumental to a publication of that which is noxious and illegal, without any moral blame imputable to himself, he cannot be criminally, even although he may be civilly responsible.

A lunatic or madman, incapable of distinguishing between right and wrong, is not a fit object of penal visitation [1], neither is a

(a) See Haw. Pl. C. c. 73, s. 1. 5. Co. 125. 5. Mod. 166. Salk. 418. 4 Bl. Comm. 125, 150. As malice is necessary in order to constitute civil responsibility, *supra* vol. I., p. 209, 210, a fortiori it is essential to make a party criminally amenable.

[1] *Insanity* has been held a good defence in an action for words. *Dickinson v. Barber*, 9 Mass. R. 225. See also *Horner v. Marshall's admx.* 5 Munf. 466.

party punishable who publishes a libel without knowledge of its contents, provided his ignorance were not in itself culpable : as where a servant delivers a sealed letter without knowledge of its libellous quality, in obedience to the command of his master, and without any reason for supposing the order to be illegal.

But where the act is knowingly and intentionally done, it is plain that the mere absence of an actual intention to injure cannot absolve from criminal responsibility, when circumstances are wanting which the law recognizes as supplying an absolute or modified justification. Where an act is voluntary, injurious in its tendency, and illegal in its quality, it would be contrary to all legal principle and analogy to allow the offender to justify or excuse himself, either on the ground that he mistook the law, or that he offended against the law with such good motives as ought to excuse him. To allow the plea of mistake would be to confer a premium upon ignorance, *and afford an excuse for every possible enormity ; to allow ['242] every man to set up his own crude opinions against the wisdom of the law, would be at once to overthrow the law, as an universal rule of conduct ; there is no law when obedience is merely optional.

The same principles apply, where a man negligently and heedlessly does an injurious and mischievous act, without using proper caution : gross inattention to the interests of others is morally as well as legally speaking, sufficient to render the offending party amenable for the consequences (*b*).

(*b*) It is unnecessary to cite authorities to show that, in numerous instances of criminal responsibility, an actual intention to injure is not material, and that the wilful doing of a noxious act, or the wilful omission of a legal obligation, is sufficient to constitute criminal responsibility.

There is, it is true, a distinction between civil and criminal responsibility in respect of the agents understanding and knowledge of consequences : one who was so defective, in point of understanding, as to be unable to distinguish between right and wrong, would not be criminally though he would be civilly responsible for the consequences of his act.

And where one who can distinguish right from wrong, does an act which in itself is unlawful, but does it through mistake or ignorance, but without any blame even of negligence or carelessness, he is not criminally responsible ; as where a man has had poison delivered to him when he asked for wholesome

*In the case of the *King v. Harvey (c)*, which was one of an information against the defendant for falsely and maliciously publishing a libel, asserting that the King was afflicted with mental derangement, the jury, having inquired from the Court whether, in order to convict a defendant for the publication of a libel, a malicious intention must not have existed in his mind, the Chief Justice answered, that a person who publishes that which is calumnious, concerning the character of another, must be presumed to have intended to do that which the publication is necessarily and obviously calculated to effect, unless he can shew the contrary, and the onus of proving the contrary lies upon him.

[*244] And in the case of the *King v. Sir Francis Burdett (e)*, where the publication alleged that divers liege subjects of the king had been inhumanly cut down, maimed, and killed, by certain troops of the king, the learned judge, in summing up, informed the jury that the intention was to be collected from the paper itself, unless explained by the mode of publication or other circumstances, and that if its contents were likely to excite sedition, the defendant must be presumed to intend that which his act is likely to produce.

The question therefore arises, what circumstances does the law regard as affording either an absolute justification, independently of the actual intention of the publisher, or a qualified or modified justification dependent on the absence or existence of malice in fact.

What circumstances then afford an absolute justification independently of intention?

medicine, and supposing it to be the latter, administers it to another. But it is ignorance of the act and its consequences which absolves from guilt; and even ignorance of the nature of the act and its probable consequences will not absolve, except in the absence of all carelessness, negligence, and inattention. If a chemist or apothecary were even by mistake, yet in consequence of negligence and inattention, to administer poison instead of medicine, he would be criminally liable for the consequences.

And ignorance to excuse from penal censure must be ignorance in fact and not ignorance of law. Thus, though a person who without any negligence administered poison instead of medicine would be excusable for want of knowledge of the fact, yet if he were voluntarily to destroy one who was excommunicated or outlawed, he would be guilty of murder, although he ignorantly supposed that he was bound to kill him when he met him.

(c) *R. v. Harvey*, 2 B. & C. 257.

(e) *R. v. Burdett*, 4 B. & A. 95.

The same principles of policy and convenience which have been already observed upon in reference to justifications in civil actions, apply also, for the most part, (but with one striking exception,) to criminal prosecutions.

Whenever it happens that the law, for the sake *of ex- [*245] cluding some greater degree of inconvenience, deprives individuals of their remedy by action, without regard to the mischief occasioned, or the malice of the author, the same reasons ordinarily exclude a criminal prosecution, which would usually produce the same kind of inconvenience even to a greater extent. Hence it is that no one is criminally responsible in respect of any publication duly made in the ordinary course of any parliamentary or judicial proceeding. Thus, as has already been observed, in reference to the civil remedy, no member of either House is responsible in a court of justice for any thing said in that House, and in such cases, to use the words of Lord Kenyon (*f*), courts of law possess no jurisdiction.

The immunity, which the law for wise considerations thus extends to publications made in the ordinary course of parliamentary or judicial proceedings, is confined to such as are warranted by the occasion. If a member of either House of parliament publish his speech beyond the walls of the House, he can claim no privilege, but stands precisely in the same situation with any other person (*g*).

*In the case of the *King v. Creevey* (*h*), it was held [*246] that a member of the House of Commons was liable to be convicted on an indictment for a libel on the character of an individual, although the publication was a correct report of a speech made by the defendant in the House of Commons, and had been published by him in consequence of an incorrect report having been published in other newspapers.

So it is also clear that if any party to a judicial proceeding were to be guilty of any publication of defamatory matter, which was ex-

(*f*) *R. v. Ld. Abingdon*, 1 Esp. C. 226, supra vol. I. p. 239; see also the *King v. Wright*, 8 T. R. 293, supra vol. I. p. 257.

(*g*) *R. v. Ld. Abingdon*, 1 Esp. C. 226. *R. v. Creevey*, 1 M. & S. 273.

(*h*) 1 M. & S. 273.

trajudicial and not warranted by the ordinary course of proceeding, he could derive no justification or excuse from the occasion.

In the case of the *King v. Salsbury* (i), it was held that it was indictable to publish a scandalous petition to the House of Lords, or a scandalous affidavit made in a court of justice.

As one who faithfully reports judicial proceedings is not civilly, so neither is he criminally responsible; the same reason which excludes an action in the one case, repels a prosecution in the other; although the characters of individuals may casually
[*247] suffer from the publicity of such *proceedings, a superior degree of benefit arises to the public at large.

It is a matter of public policy not only that the mode of administering justice should be known to all, but also that the condemnation of offenders against the law should be publicly announced; for the conviction of any member of society of a crime, in many respects operates in rem; it affects the state and situation of the individual as a member of society, and therefore the public have an interest in knowing the fact. It has even been held, that every one was bound to take notice of an attainder in the county where he lived (k). It seems that to publish even by writing or print, according to the truth, that a party has been convicted of a crime, is a good justification to a criminal charge, as well as in a civil action.

It has already been seen (l) that the principle on which this important privilege is founded is limited both in respect of the *subject matter* reported, and of the *manner* in which it is reported.

[*248] As the authorities on this subject have already *been noticed, it is unnecessary again to cite them.

And next it has been seen that it is, under some modifications, a good defence to an action to shew that the defendant, at the time of the publication, gave such a description of the author of the slander, and the words he used, as would enable the plaintiff to recover against him. And it seems that, according to the ancient

(i) 1 Ld. Ray. 341; vide supra vol. I, p. 253, 326.

(k) 3 P. W. 494. Staunf. 96. 8. c. 4, f. 3, and, therefore, it has been said that, on an indictment against one as an accessory after the fact in harbouring a felon, an attainder of the principal, within the county, was proof of the previous knowledge of the attainder.

(l) Vol. I. p. 263.

law, the surrendering the author was sufficient to exempt a party who republished the slander from punishment. It appears, from the statutes of *Scandalum Magnatum*, that no punishment was to be inflicted in case the defendant gave up the author of the false tale, and that the imprisonment, even after conviction, was to cease upon the offender's discovering the first mover of slander (*m*).

It does not, however, appear that such a defence to an indictment at common law has ever been allowed; nor could it in principle be admitted (*n*), since the law regards not the truth or falsity of the libel, but only its tendency to provoke and injure; and, therefore, where the matter is noxious and injurious, and immediately tends to a "breach of the peace, the publisher cannot [*249] be allowed to protect himself by the plea that he was not the author of the scandalous matter, but, on the contrary, that at the time of publication he truly declared who the author was [1]. But it is to be observed, that the making such a disclosure, at the time of publication, may be material as evidence to rebut the inference of malice, which would otherwise arise from the contents of the libel itself: as, for instance, if a party to whom a libel was published shewed it to the person reflected on, with a *bona fide* intention of giving him an opportunity for making an explanation which the other was entitled to demand, or with a friendly intention to enable him to exculpate himself or seek his legal remedy.

And even a subsequent disclosure is usually regarded as a circumstance to be considered in mitigation, where the fact of publication cannot be justified. It is usually more material to the party aggrieved to identify the anonymous and secret assailant of his reputation, whether it be for the purpose of civil redress or future safety, than to punish the mere instrument of his malice; and such a reparation, though it be tardy, is frequently the only one in the power of the offending party.

(*m*) Vol. I. p. 176.

(*n*) If a highwayman shall at the gallows arraign the justice of the law and of those who condemned him, he who publishes shall not go unpunished. 4 Read. St. Law, 154. Dig. L. L. 32.

[1] See Vol. I. p. 340, note [1] as to the effect of disclosing the name of the author of the slander, even in a civil action.

[*250] It is now to be observed that there is one great *distinction (which has already been alluded to,) between justifications in civil and criminal proceedings; in the latter the truth is not, as in the former, a ground of justification. It has already been seen that the truth is a justification in a civil action, not solely on grounds of extrinsic and collateral policy, but also because the very foundation fails on which the claim to damages might otherwise be erected, that foundation being the *falsity* of the defamatory charge (*o*). On the other hand, the *tendency* of the defamation to produce a breach of the peace, is of the essence of the offence, as far as the public are concerned; and, therefore, the truth or falsity of the publication is collateral to the offence—the imputation, it is obvious, may be not the less provoking because it is true.

As it is essential to prohibit all direct incitements and provocations to break the peace of society, by acts of violence and outrage, so also is it necessary to provide against indirect provocations, which are not distinguishable from more direct attempts either in point of motive or of mischievous results.

If a party were to send a letter to another, directly soliciting him to commit a breach of the peace, no one could doubt the criminality of the *act. Were the writer to go further and specify some wicked or dishonourable act, as the ground of challenge, or to use expressions of contempt or abuse calculated to excite irritation, and to occasion the party addressed to comply with the request, it would readily be admitted that the state of the case would not be altered for the better, and even though the writer omitted the direct request, but used expressions just as likely to produce the same result, it would be difficult to contend that the case was altered, either in point of intention or of probable consequences.

At all events, therefore, the law is not inconsistent in admitting such a justification in answer to a claim for compensation in damages, at the suit of a guilty party, and in rejecting the same justification on a prosecution for the benefit and security of the public at large.

(*o*) See the Preliminary Discourse, and *supra* vol. I. p. 229.

Some remarks on the policy of admitting such a justification on a criminal charge have been made in another place (*p*).

Whatever may have been the ancient rule of law upon the subject, on this occasion it may be sufficient to state what the law of England at present is on this point; it has now long been settled, that the truth of a libel on an individual is no defence to a criminal information or indictment (*q*) [1].

(*p*) See Preliminary Discourse.

(*q*) According to the 4th resolution, in the case *De Libellis Famosis*, 5 Co. 125, "It is not material whether the libel be true or whether the party against whom it is made be of good or ill fame, for in a settled state of government the party grieved ought to complain for every injury done him in an ordinary course of law, and not by any means to revenge himself either by the odious course of libelling or otherwise; he who kills a man with his sword in a fight is a great offender, but he is a greater offender who poisons another; for in the one case he who is openly assaulted may defend himself, and knows his adversary, and may endeavour to prevent it; but poisoning may be done so secretly that none can defend himself against it, for which cause the offence is more dangerous, because the offender cannot easily be known."

The only authority cited by Lord Coke is that of *Lake v. Hatton*, Hobart 252, where it was ruled by Hobart, L.C. J. in the Star Chamber, that a libel cannot be justified, though the contents be true.

In an anonymous case, 11 Mod. 99, an action was brought for a libel; Holt, C. J. said, a man may justify in an action on the case for words for a libel; otherwise in an indictment.

In the *King v. Bickerton*, Str. 468, upon a motion for a criminal information the chief justice declared that though truth be no justification for a libel, as it is for defamatory words, yet it will be sufficient cause to prevent the extraordinary interposition of the court.

Lord Coke gravely asserts that there are certain marks by which a libeller may be known, "quia tria sequuntur defamatorem, famosum; 1 *Pravitas incrementum*, increase of lewdness; 2 *Bursæ decrementum*, decrease of money and beggary; 3 *Conscientiæ detrimentum*, shipwreck of conscience."

[1] In *New-York*, the law is otherwise. There the truth is a defence to an indictment, provided it be made to appear that the matter charged as libellous was published with good motives and for justifiable ends. A declaratory act was passed by the Legislature in 1805, whereby it is provided "that in every prosecution for writing or publishing any libel, it shall be lawful for the defendant, upon the trial of the cause, to give in evidence, in his defence, the truth of the matter contained in the publication charged as libellous: Provided al-

The law to this effect being clearly established, it would be superfluous to enquire, in this place, whether, on general principles

ways that such evidence shall not be a justification, unless on the trial it shall be further made satisfactorily to appear, that the matter charged as libellous was published with *good motives* and for *justifiable ends*. *Statutes of N. Y., 4th vol. Webster & Shinner's ed. ch. 90, p. 232.* This act was passed in consequence of the doctrines held on the trial of the famous case of *The People v. Croswell*, in which the distinguished ALEXANDER HAMILTON appeared as the advocate of the liberty of the press. Croswell was indicted for a libel on Thomas Jefferson, then President of the United States and convicted by the verdict of the jury. He applied to the Supreme Court for a new trial, and the principal questions submitted by counsel and passed upon by the court, were : I. On the trial of an indictment for a libel, can the defendant give the truth in evidence ? and II. Have the jury the right to decide both the *law* and the *fact* ? Justices Kent and Thompson held the *affirmative* upon both these questions, and Chief Justice Lewis and Livingston the negative. The case was argued in February, 1804. At the succeeding May term, the Chief Justice announced that the court were equally divided, in consequence of being temporarily composed of only four judges, and that the public prosecutor was entitled to move for judgment. No motion was however made, probably because on the last day of the session of the legislature in April 1804, a bill entitled "*An act relative to libels,*" had been passed by both houses, and delivered to the *Council of Revision*, who retained it at the time of the decision of that case, and with whom it remained until the session of 1805, when it was sent back with objections. The principal objection was that it did not contain a restriction similar to that incorporated in the act as finally adopted, viz : that the truth should be no justification unless it should be satisfactorily shewn that the matter charged as libellous was published with *good motives* and for *justifiable ends*. The legislature acquiesced, and an act containing that provision was accordingly passed. *The People v. Croswell*, 3 Johns. Cas. 337, *et seq.* The principle of which was subsequently incorporated into the BILL OF RIGHTS, 1 Revised Statutes 94, § 21, and also into the amended CONSTITUTION of 1821, Art. 7, § 8. In the amended Constitution of New-York adopted in 1846, the same provisions were inserted in nearly the same words, viz : "In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury ; and if it shall appear to the jury that the matter charged as libellous is true, and was published with good motives and for justifiable ends, the party shall be acquitted ; and the jury shall have the right to determine the law and the fact." See Laws of New-York of 1847, p. 386.

Similar provisions in respect to the *truth* and the *motives of publication* are contained in the constitutions of Mississippi and Michigan. The language of the constitution of Pennsylvania in this respect is different. It authorizes the *truth* to be given in evidence, and empowers the jury to determine the *law* and

of policy and convenience a different rule might not be adopted in order to avoid the mischief of suppressing the wholesome diffusion of truth, and such a knowledge of the habits and characters of individuals as is essential to the interests of society. It may, however, be observed, in the first place, that [*253] out going the length of sanctioning the publication of truth, regardless either of motive, occasion or consequences, great latitude is allowed in consideration of the convenience of society, and that such communications seem to be privileged whenever they are fairly warranted by any reasonable occasion or exigency ; that the penal restraint against publishing the truth does not extend to the creating any civil liability, nor, in general, to oral communica-

the *fact* in prosecutions for the publication of papers investigating the official conduct of officers or men in public stations, or where the matter published is proper for public information. The provision in the constitutions of Kentucky, Illinois, Delaware, Ohio, Indiana, and Arkansas, is the same as that of Pennsylvania, and so is the provision in the constitution of Maine, except that it extends to publications respecting *candidates* as well as to *officers* already in existence. In the constitution of Connecticut, provision is made for giving the truth in evidence, and authorizing the jury to determine both the law and the fact. In several of the States, there is only a general provision in favor of the *liberty of the press*, and in some the subject is not noticed. Nothing is said respecting giving the truth in evidence in the constitution of South Carolina, but the Supreme Court of that State has declared the law there to be, that in prosecutions for libels, the *intention* with which the publication is made, as well as the *fact of publication* and *truth* of the innuendoes are involved in the general issue ; and the whole case, *law* as well as *fact*, is resolved by a general verdict. *State v. Allen*, 1 McCord's R. 525. In Massachusetts, the Supreme Court held, in 1808, in the case of *The Commonwealth v. Clapp*, 4 Mass. R. 168, which was on an *indictment* for a *libel*, that the defendant may not justify himself for publishing a libel, merely by proving the *truth* of the publication, but that he may prove that the publication was for a *justifiable purpose*, and *not malicious*, or with the intent to defame ; and where the purpose is justifiable (the court say) there may be cases when the truth may be given in evidence.

In 1849 the Legislature of New-York enacted " In an action for libel or slander, it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter, out of which the cause of action arose ; but it shall be sufficient to state generally, that the same was published or spoken concerning the plaintiff. And if such allegation be controverted, the plaintiff shall be bound to establish on trial that it was so published or spoken." *Code as amended*, 1849, § 164.

tions, unless they amount to the most direct and personal provocations to break the peace. Finally, it may be remarked that the admitting truth to be a justification against a criminal charge, would be attended with one difficulty and mischief so great, as, without material alterations in our *criminal procedure, to be in effect insuperable. As any one may commence a prosecution for a libel on any other party, if a justification of the truth were abmissible, the character of an individual might be made the subject of investigation without his authority, even without his knowledge, and without his having any opportunity to defend himself; thus it would be in the power of any two malicious men most effectually to injure and calumniate any other individual under the pretext of a judicial inquiry.

These reasons, which have been urged as the ground of rejecting evidence of the truth of a libellous charge as a complete defence to an indictment or information, apply to cases where the prosecutor is guilty of the criminal or immoral act imputed: in other instances, the same principles apply with a still superior force, strengthened by circumstances peculiar to themselves.

Thus, where the libel consists in the holding up an individual to ridicule, by exposing some personal deformity, in a lampoon or print, the truth of the representation would certainly aggravate the ridicule and would by no means lessen the malice of the author (*r*).

*With respect to libels against religion, or morality, [*255] the permitting such a defence would be attended with consequences almost too absurd to mention. Suppose a person to publish, that no overruling Providence exists; or that, to break a promise or an oath is a virtuous act—could the discussion of such questions be tolerated in a court, or brought to issue before a jury? or would proof that indecent transactions have actually occurred, supply any excuse for the public exhibition of them in a print or a pamphlet?

(*r*) Dig. L. L. 16. 3 Bac. Ab. 495. 4 Bac. Ab. 516. *King v. Roberts*, cor. Ld. Hardwicke. Puta si alter pœnam delicti sui sustinuerit, aut in vitium naturale objiciatur, claudes aliquis, luscus, aut gibbosus vocetur veritatem convicii non excusare quo minus animo injuriandi, id factum presumatur, contrarii tamen probationem hic admittendam. Vinn. in. In. Just. lib. 4.

Where, however, an indictment is expressly framed upon the statutes of *Scandalum Magnatum*, it may be doubted whether the truth would not supply a defence, since the words *false* and *lies* are used as descriptive of the offence (s).

In the next place, there exists an important and numerous class of cases, in which the law, consulting the general convenience and the exigences of society, extends a qualified protection, dependent on the question whether the party has acted *bon fide* on an occasion recognized by *the law, or has merely used [*256] the occasion as a colour and pretext for doing mischief. This most important limitation seems, on principles of public policy already adverted to in discussing the grounds of civil liability, to extend to all publications made in the fair discharge of any public or private, or legal or moral duty, of which the ordinary exigences of society, or the party's own private interests, require the performance.

This principle seems to comprehend all publications on subjects of general and public concern in which the author possesses an interest in common with the rest of the community.

Every one, as it seems, has a right to publish that which, in his opinion, will tend to enlighten, instruct, or even amuse mankind; he who attains his object may justly be regarded as a benefactor to society; he who fails is not amenable as a criminal, however erroneous his views may be, unless it plainly appear that his real object was not to improve or benefit mankind, but to produce public mischief and disorder by alienating men's minds from their public or private duties, by base or unworthy means, by destroying their religious faith, corrupting their morals, or instigating them to acts of sedition, tumult, and outrage, or to some other violation of peace.

Upon such principles it is that no man is punishable in respect of the publication of his opinion *on subjects in which mankind possess a common interest, be they theological (t), [*257] moral (u), political (x), or critical (y), provided his

(s) See 12 Rep. 133. 2 Mod. 150.

(t) Supra c. vi.

(x) Supra c. viii.

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(u) Supra c. vii.

(y) Supra vol. I. p. 305.

communications be sincere and honest and not used as a cloak of maliciousness.

The same essential principle also governs communications affecting the characters of private individuals. No man is punishable as a criminal for a publication made on an occasion which the interests of others, or even his own, fairly required him to make, though its contents may convey an imputation on the character of another, provided, such a publication was called for by the exigency of the occasion, and was made *bonâ fide* with a view to the occasion without malice.

Many instances, particularly that of the *King v. Bayley* (z), have already been cited in illustration of the operation of the same principle on the question of civil liability; it is, therefore, unnecessary to repeat them, for the question of civil and criminal liability, in the case of libels reflecting on individuals, seems in this class of cases to be identical, whenever the publication of such a [*258] *libel is criminal, as concerns the public, it constitutes a civil injury repairable in damages at the suit of the party calumniated (a).

It is, however, important to observe, in respect of this class of cases, where the intention of the publisher is the test of civil or of penal liability, that with a view to exemption as well as civil responsibility, the mere abstract intention of the party cannot protect him, in the absence of facts, which constitute an occasion recognized by the law. The law allows no man to defend himself by saying, "I did an act, in itself injurious, mischievous, and illegal, but I did it with an excellent intention." And it must also be remarked, that a publication not warranted by the nature and exigency of the occasion, cannot be justified in a criminal, any more than in a civil proceeding; for if the occasion does not justify or excuse the act, neither, on the principle just adverted to, can mere abstract good intention supply a sufficient defence [1].

(z) 3 Bac. Ab. Libel, A. 2, cited by Best, J. 5 B. & A. 647. Supra vol. I. 315.

(a) Supra vol. I. p. 268.

[1] Thus it will be seen that the *common law* secures the very right to obtain which it was supposed necessary to pass the act of 1805, referred to in page 252 supra, note [1]. By that act a defendant prosecuted criminally for a libel

is authorized in his defence to give in evidence the *truth* of the matter charged as libellous, but cannot do so unless it be made to appear that the matter charged as libellous was published *with good motives* and *for justifiable ends*. At the common law, a defendant prosecuted criminally cannot give the *truth* in evidence in his defence; but he may show the *occasion* upon which the publication was made, and if it be on a subject of general and *public concern* in which he has an interest in common with the rest of the community, or if the business transactions of others, or even his own, require the making of the communication, *he is not punishable*, provided the communication be sincere and honest, and not used as a cloak of maliciousness. In one respect indeed, the statute is not as broad as the common law. The former authorizes the *truth of the matter* alleged to be libellous to be given in evidence in defence, provided the motive of the author be pure and the end of the publication *justifiable*; whereas the latter excuses the author on showing that the *occasion* was such as to justify the publication, without requiring, or even permitting the truth of the matter to be given in evidence, provided the communication was made *bona fide* with a view to the occasion *without malice*.

In criminal prosecutions for libels the proof of *good motives* and *justifiable ends* in the making of the publication, is required to justify the party. It was so held under the provisions in the constitutions of both *New York* and *Massachusetts*. *The People v. Barthelemy*, 2 Hill, 248; *The Commonwealth v. Bonner* 9 Metcalf. 410.

CHAPTER XIII.

PROCEEDINGS AGAINST OFFENDERS.

[*259] *THE proceedings against offenders are either summary, as by their immediate apprehension and imprisonment ; by attachment, by binding over to their good behaviour ; or, in the more usual mode, by information [1] or indictment. The summary process is in general founded upon contemptuous language and reflections applied to those who preside in courts of justice and their proceedings ; and such contempts are either direct, where a judge or magistrate is openly insulted in the execution of his office, or consequential, where the offender, by speaking or writing contemptuously of the court, or its judges in their judicial capacity, reflects upon the authority by which they were appointed, and creates a prejudice against the administration of justice. And first, where the insult is offered in the face of the court by the use of contumelious language, demonstrating the want of that respect [*260] and regard which is essential to the preservation of *its authority, the offender, it is said, may be instantly apprehended, fined, or imprisoned, at the discretion of the judge, without further examination (a).

This doctrine appears to extend to all cases where contemptuous words are spoken in the presence of a magistrate in the actual discharge of his duty. As if a man should say to a justice of the peace in the execution of his office, “ You are a rogue (b) and a

(a) Cro. Eliz. 78. 2 Roll. Ab. 78. 4 Bl. Comm. 286. Staund. P. C. 73. b.

(b) Str. 420. Ow. 113. Mo. 470. Cro. El. 581.

[1] See note [1] p. 272, post.

liar," or tell the judge of a Court Leet that he is a fool (*c*), or is forsworn (*d*), or say—"If I cannot have justice here, I will have (*e*) it elsewhere." And though the judge may elect to proceed in this summary mode, yet if he does not, the offender is liable to an indictment, since, wherever a justice may commit for a contempt, the party may be indicted for the misdemeanor (*f*).

Where the contempt is not offered immediately in the face of the court, but consists in insolent comments upon the court or its proceedings, or in the indecent publication of matters still pending, the effect of which may be to create *prejudice [*261] and partiality, and thereby to hinder the fair administration of justice, the proceeding is by attachment, which is a process from a Court of Record, awarded by the justices at their discretion, upon a suggestion, or upon their own knowledge (*g*) or by imposing a fine.

It appears, generally, that an attachment may be granted by any of the superior courts of Westminster Hall against any persons guilty of contempts against them. So a Court of Gaol Delivery may impose a fine, and, as it seems, punish by attachment, for a contempt in prematurely publishing portions of proceedings still pending, in contempt of the prohibition of the Court (*h*).

And a judge, at Nisi Prius, may fine a defendant, on his trial for a misdemeanor, for contemptuous and offensive expressions, applied *to the judge in the course of making his [*262] defence (*i*).

(*c*) Cro. Eliz. 78.

(*d*) 2 Roll. Ab. 78.

(*f*) Str. 420.

(*e*) 1 Sid. 144. 1 Keb. 508.

(*g*) 2 Haw. 213, vid. Wils. 300.

(*h*) In the case of the King v. Clement, (4 B. & A. 218,) it was held, that a court of gaol delivery had power to prohibit the publication of any part of the proceedings against several persons charged with high treason, until the whole should be brought to a conclusion. And it was held, that a fine imposed by the court on the editor of a newspaper, for a contempt in publishing those proceedings, contrary to such order, was legal, although the fine was imposed in his absence, service of notice to appear to answer for the contempt, having been served at the office at which the newspaper was published according to the st. 38 G. III, c. 78, s. 12.

(*i*) R. v. Davison, 4 B. & A. 329. Abbott C. J. in giving his judgment observed, "If I thought that the decision I am about to pronounce, could have

When a party, not present in court, publishes any contemptuous expression against the court or its proceedings, the court will, upon an affidavit of the fact, make a rule upon him to shew cause why an attachment should not be granted against him; and in some cases, where the offence is of a very flagrant nature, will grant an attachment in the first instance [1].

[*263] *Upon a rule granted (*k*) against the defendant *Wiatt*, to shew cause why an attachment should not issue against him for publishing a libel on the Court of King's Bench, the defendant shewed by affidavit that his fault was not wilful, but merely through ignorance; that he had the libel from one Crownfield, a printer in Cambridge; that it was in Latin, a language which the defendant did not understand; and that he did not know who was the author,

the effect of restraining any person, who may hereafter stand on his trial, for making a bold as well as a legitimate course of defence, I would pause before I pronounced that decision. The question, indeed, is a momentous one. It is absolutely a question whether the law of the land shall or shall not continue to be properly administered. For it is utterly impossible that the law can be so administered if those who are charged with the duty of administering it, have not power to prevent instances of indecorum from occurring in their own presence. That power has been vested in the judges, not for their personal protection, but for that of the public; and a judge will depart from his bounden duty if he forbears to use it when occasions arise which call for its exercise. I quite agree that this power, more especially where it is to be exercised on the person of a defendant, is to be used with the greatest care and moderation. But if the publication of blasphemy and irreligion cannot in any other way be prevented, in my opinion, a judge will betray his trust who does not put it in force."

(*k*) 8 Mod. 123.

[1] In the *People v. Freer*, 1 Caines 484, 518, the defendant was brought before the Supreme Court for a publication apparently intended to prejudice and influence the public mind, and to intimidate the court in deciding a motion pending for a new trial. A rule was granted to shew cause, and the defendant not appearing at the appointed day, an attachment was issued against him. On being brought into court, he cleared himself of all *intentional* disrespect or contempt. The court under the peculiar circumstances of the case, and in the hope that the notice taken of the conduct of the defendant, would serve as a warning to others, inflicted only a *nominal fine*. See also the cases of *Hollingsworth v. Duane*, Wallace's R. 77; *Bayard v. Passmere*, 3 Yeates 438; and *Respublica v. Oswald*, 1 Dallas 319, in which attachments were issued for publications in reference to causes pending in court.

otherwise than by a letter which he received from the printer, and which was affixed to the affidavit by which letter it appeared that Dr. Middleton was the author. On this it was moved that the rule should be discharged; but the rule was continued on the defendant until he made out his allegation against the printer, who was therefore joined in the rule, that both of them might be before the court. In the next term, Dr. Middleton (*l*) appeared, and confessed that he was the author of the book; the rule was then discharged against the publisher and printer, and the doctor was committed until further consideration. After a few days' confinement he was brought into court, fined £50, and bound to his good behaviour for a year.

*A rule (*m*) was granted to shew cause why an attachment should not issue against Elizabeth Mayer and [*264] Dowling, for publishing a libel on the proceedings of the court in the trial of Lady Lawley. Elizabeth Mayer produced an affidavit, stating, that her husband kept a pamphlet shop; that in his absence Vaughan came to the shop and asked for Lady Lawley's trial; that she did not know that it was in the shop, but searching found it, and refused to sell it to Vaughan, but permitted him to read it. The court said it was beyond all question that attachments had been granted in such cases, and particularly alluded to *Dr. Middleton's* case. The court, in general, agreed to discharge the rule as to her, and said they could not make the rule absolute as to Dowling, because there was no affidavit of service.

A rule having been (*n*) obtained to shew cause why an information should not be granted, the defendant, on being served with the rule, shewed his disregard of it in very contemptuous language. Upon a motion for an attachment, grounded upon this contempt, Northey, Attorney-General, insisted that he ought first to be heard to shew cause against it; but the court said, "He shall answer it in custody, for it is to no purpose *to serve him [*265] with a second rule who has slighted and despised the first; it would be to expose the court to further contempt."

(*l*) Fort. R. 201.

(*m*) Mich. 8 G. II. 1732. 2 Barnard. 43, K. B.

(*n*) 1 Salk. 84.

And where the court apprehend that the attachment will be forcibly resisted, they will order the sheriff of the county (*o*) to take with him a force sufficient for its due execution. But it seems that the court will not grant an attachment (*p*) in the first instance, unless the words be sworn to by two witnesses, since otherwise it would be in the power of one hardy man to hinder another of an opportunity of defending himself before he was deprived of his liberty; and when contemptuous words are spoken of the court, the rule for attachment is granted in the first instance; but where they are spoken of its process, a rule to shew cause (*q*) only; and the court will punish for contemptuous words spoken on the delivery of a declaration (*r*) in ejectment.

Where the proprietor of a newspaper was guilty of a contempt, in publishing the proceedings of a Court of Gaol Delivery contrary to the order of the court; the court, on affidavit of the fact, [*266] and after an affidavit of notice to the party *to appear before the court to answer the contempt on a day specified and default made, proceeded to impose a fine of £500; and the Court of King's Bench holding the proceeding to be regular, afterwards refused a certiorari to bring up the proceedings into that court (*s*) [*a a*].

When the party has been brought into court, he is either committed, in order to answer interrogatories, or is permitted to enter into a recognizance with two sureties, in such sum as the court will direct, to appear and make answer upon oath to such interrogatories (*t*) as shall be exhibited against him.

And it is said (*u*), that the party cannot confess the contempt and throw himself upon the mercy of the court, except in cases of rescue and of contempts committed in the face of the court. If the

(*o*) 1 Str. 185.

(*p*) 1 Str. 185, 3 At. 219, Say. Rep. 114.

(*q*) Tidd. 418, vid. Str. 185, 1068.

(*r*) Str. 567.

(*s*) *The King v. Clement*, 4 B. & A. 218, supra 261.

[*a a*] In the case of *The King v. Gilham*, 1 M. & M. 165, it was held that exhibiting in an assize town inflammatory publications concerning a prisoner about to be tried at the assizes for a crime, was not a contempt which the judge of assize could interfere to prevent by commitment.

(*t*) *Haw. P. C. c. 22, 1.* Barnard. K. B. 58.

(*u*) 1 Bl. 649, 6. vide 4 Bl. Comm. 284.

party be discharged upon his recognizance (*x*) to answer interrogatories, and none be exhibited within four days after entering into such recognizance, the court will discharge it upon motion ; but if no such motion be made, the court will compel him to answer interrogatories exhibited after the four days. Upon these interrogatories, examinations are taken, and *it is referred to the Master [*267] of the Crown Office to make his report ; the party (*y*) is then either acquitted or adjudged to be in contempt.

If the party, in his answer, purge himself from the charge upon oath, though he is liable to a prosecution for the perjury (*z*), if he has sworn falsely, he must nevertheless be acquitted of the contempt and his answer cannot (*a*) be disproved by adverse and contradictory affidavits.

Next, by requiring sureties of the peace, or for the good behaviour of the party.—It seems agreed, that the publication of a libel, does not amount to a breach of the peace, but rests in tendency only.

In Dalton's Justice (*b*), a libel is defined as a thing tending to a breach of the peace ; in *Sir Baptist Hicks's* (*c*) case, it is called a provocation to a breach of the peace : and in the *King* (*d*) v. *Summers*, it was held to be cognizable before justices, because it *tended* to a breach of the peace ; and in Hawkins's Pleas of the Crown (*e*), and Sir William Blackstone's Commentaries (*f*), a libel in the criminal sense is also defined by its tendency. In the case of *The King v. Wilkes*, *the court of Common [*268] Pleas (*g*) gave a decided opinion to the same effect.

And L. C. J. Pratt observed, " I cannot find that a libeller is bound to find surety of the peace in any book whatever, nor ever was in any case but one, viz.—the case of the seven Bishops, where three Judges said, that surety of the peace was required in the case of libel : Judge Powell, the only honest man of the four judges, dissented ; and I am bold to be of his opinion, and to say, that the case is not law. Upon the whole, it is absurd to require surety of the

(*x*) Haw. P. C. 22, s. 1. 5 T. R. 362.

(*z*) 6 Mod. 37.

(*c*) Hob. 224.

(*f*) 4 Bl. C. 150.

(*a*) 4 Bl. Comm. 288.

(*d*) Lev. 139.

(*g*) 2 Wils. 150.

(*y*) B. R. H. 23.

(*b*) 289.

(*e*) c. 73, s. 2

peace in the case of a libeller." And it was held in the above case, that though surety of the peace might be required in the case of libel, it could not exclude the privilege of a member of either House of Parliament, who is entitled to privilege from arrest, in all cases except treason, felony, and actual breach of the peace; and the decision of the court in the proceeding against the seven Bishops, who were committed to the Tower for not entering into recognizances after having published an alleged libel, in their petition to the King, was strongly reprobated [1]. But it has been the practice, from very early times, to require security for the

[*269] good behaviour from persons publishing contumelious *and disrespectful words concerning ministers and officers of justice, and their proceedings.

It appears from the 3d Institute (*h*), that in the reign of Edward the 3d, John de Northampton, an attorney of the King's Bench, was committed to the custody of the marshal, for having written a letter reflecting on the conduct of the Justice; and that he afterwards found six mainpernors for his good behaviour.

And it seems that sureties for the good behavior may be required from any person (*i*) who applies contemptuous or disrespectful language to any Judge, Justice of the Peace, Mayor, or other civil Magistrate, though he be not in the actual execution of his duty (*i*), and though the words have no relation to his office.

And that the rule extends to general words of disparagement spoken of such magistrates in their absence (*k*); but Lord Holt, C. J. intimated, that this ought not to be done by the offended

(*h*) 174.

(*i*) Cro. El. 78. Salk. 697. Haw. P. C. c. 61, s. 2. 6 Mod. 124. Holt 654. Str. 420.

(*k*) Cro. El. 78. 1 Lev. 52, c. 2, s. 3. 11 Mod. 117. Cro. Eliz. 689. contra.

[1] In *Respublica v. Duane*, 1 Binney 98, C. J. TILGHMAN held that it was most agreeable to the spirit of the constitution of the State, and most conducive to the suppression of libels to adopt it as a general rule, not to demand surety for good behavior before conviction; and in conformity to these views, discharged from custody William Duane, who had been committed by the Mayor of Philadelphia on his refusal to give sureties for good behavior in a complaint against him for publishing a libel concerning the Marquis de Casa Yrujo, the then ambassador of the King of Spain.

justice, but by one of his brethren (*l*). And the same learned Judge, in the *Queen v. Langley* (*m*) *after ob- [*270] serving that binding to the good behavior was sufficient to secure the authority of Mayors, added, that it must be done instantly, according to *Dr. Bonham's* (*n*) case. It seems, however, from the general current of decisions upon this point, which are very perplexed and contradictory, that the words must either have been spoken in the presence of the magistrate; or if in his absence, have in some way affected him in his office. In other cases it might not be prudent in a magistrate to commit for want of sureties, since he does it at his peril, the case of commitment must be expressed with certainty upon the face of the warrant(*o*); and in case it should prove insufficient, he would be liable to an action for false imprisonment.

But it seems to be perfectly clear, that for unmannerly (*p*) expressions, used in the face of a Court of Justice, though not applied to the Court or its proceedings, or for words spoken for the purpose of deterring an inferior officer, as a constable, from the execution (*q*) of his office, or abusing him whilst discharging his duty, the offender may be bound to his good behavior.

With regard to mere rash, quarrelsome, uncivil *words [*271] in general, it seems that sureties cannot be demanded from the speaker, unless they either amount to a direct solicitation to break the peace or scandalize the government, by abusing those who are entrusted by it with the administration of justice; or be uttered with intent to deter an officer from the execution of his duty (*r*); It has been already seen, that for a libel in general, sureties for the peace are not demandable; but where a letter contains a direct challenge, the same security for the good behavior may be required as if the words had been spoken.

It is said, a recognizance to keep the peace may be forfeited by mere words, but they must directly tend to a breach of the peace, as by a challenge to fight in the party's presence (*s*).

(*l*) 12 Mod. 514.

(*m*) 6 Mod. 124.

(*n*) Stiles 251.

(*o*) Per Walmesly, J., Dean's case, Cro. El. 689.

(*p*) 1 Lev. 107. 1 Keb. 558.

(*q*) Haw. P. C. c. 61, s. 2, 3.

(*r*) Haw. P. C. c. 61, s. 3. Cro. Car. 498, 499. Cro. El. 286. Pal. 126.

(*s*) 4 Burn's Jus. 353.

By the stat. 60 G. III. and 1 Geo. IV. s. 16, it is declared and enacted that any of his Majesty's courts, or any justice of the peace, before whom any person charged with having printed or published any blasphemous or seditious libel, shall be brought for the purpose of giving bail upon such charge, shall make it a part of the condition of the recognizance, that the person so charged shall be of good behaviour during the continuance of such recognizance.

CHAPTER XIV.

PROCEEDING BY INFORMATION.

•WITH the exception of those cases where a defendant ['272] has been guilty of a contempt, no punishment can be inflicted upon him for any malicious publication, unless he shall have been previously convicted of the fact upon the oath of twelve Jurors. There are two modes, by either of which the matter may be subjected to their verdict ;—by an information, exhibited in the name of the King, or by the finding of a bill by a Grand Jury [1].

Note by the author As to the great antiquity and acknowledged legality of the proceeding by information, see the argument of Sir Bartholomew Shower, 1 Show. Rep. 106 ; 4 Bl. Comm. 305, whence it appears to have been as ancient as the law itself. To introduce any discussion upon the subject of informations would be inconsistent with the object of this treatise ; since, in the first place, informations are, in point of law, no more connected with the subject of libel than they are with any other misdemeanor ; and in the second, no doubt can possibly rest upon the legality of a practice which has prevailed for centuries, and been sanctioned by at least two acts of the legislature. 4 and 5 W. and M. c. 18. 43 G. III. c. 58.

[1] By the 5th article of the amendments of the *Constitution of the United States*, it is provided that " no person shall be held to answer for a capital or otherwise infamous crime, unless on a *presentment* or *indictment* of a *grand jury*, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war, or public danger." The same provision is contained substantially in the constitutions of the several *States*, of New-York, Ohio, Tennessee, Indiana, Maine, Michigan, Arkansas, Alabama, North-Carolina ; and in the constitutions of the States of Pennsylvania, Kentucky, Mississippi, Illinois, Delaware and Missouri, the proceeding by *information* in criminal prosecutions is *expressly* prohibited.

*Informations are of two descriptions ; they are either filed by the Attorney-General as the immediate officer of the crown, [*273] or by the master of the Crown Office upon the complaint of a private individual. The objects of those informations which are filed by the Attorney General, are such offences as manifestly tend to excite and produce some great public mischief ; but in what cases it may be necessary to call in aid this process is a matter resting in the discretion of that officer, whose duty it is, as the immediate agent of the crown, to bring under the cognizance of the court all offences and abuses which are of so dangerous a nature as to render immediate attention necessary.

In case of libels, this power has been exercised where they tend to subvert religion or morality ; to excite discontent against the constitution, the King, or his government ; to involve the country in foreign wars, or to excite particular classes of people to acts of tumult and outrage ; but it has not been usual for the Attorney-General to interfere where the libel has affected a private individual only.

With respect to informations granted by the Court of King's Bench.

These were formerly filed at the suggestion of the applicant by the master of the Crown Office, and at the discretion of [*274] that officer, without any *direct application to the court ; but the practice was put an end to by st. 4 and 5 W. and M. c. 18, which enacts, that the clerk of the crown shall not file any information without an express direction from the Court of King's Bench. It may be proper to adduce a few instances, to show the general principles by which the judges of the Court of King's Bench have been guided in the exercise of this branch of their jurisdiction, and to refer to the regulations which they have thought fit to make.

The court, it seems, will grant a criminal information in respect of any publication which manifestly and directly tends to produce any public mischief or inconvenience.

As, for publishing general reflections on the clergy of a particular diocese (*b*). For offences tending to obstruct or prevent the ordinary course of justice, as by publishing invectives against a judge

(*b*) *R. v. Williams*, 5 B. and A. 595. Though no particular prosecutor was named, and though the libellous matter was not negatived by affidavit.

and jury, by whom a defendant has been found guilty, with a view to bring into suspicion and contempt the administration of justice (e). So where a defendant on a criminal information filed against him, published hand-bills *in the assize town shortly before the trial was to have taken place, vindicating his [*275] own character and reflecting on that of the prosecutor(d).

So the court will grant a criminal information for publishing in a newspaper the evidence given before a coroner, accompanied with comments, although the statement be correct, and the party were not influenced by any malicious motive (e).

Where a corporation made an order, and entered it on their books, stating, that A. B., against whom a jury had found a verdict, with large damages, in an action for a malicious prosecution for perjury, which verdict had been confirmed by the Court of Common Pleas, was actuated by motives of public justice, in preferring the indictment; it was held to be a libel, reflecting on the administration of justice, for which an information ought to be granted (f).

So an information will be granted where the libel reflects on a body of men, though no individuals in particular be pointed out. As if the libel tend to raise tumults and disorder among the people, by exciting their hatred against a whole class of men.

*Thus the court granted an information against the de- [*276] fendant for publishing a paper containing an account of a murder lately committed upon a Jewish woman and her child, by certain Jews lately arrived from Portugal, and living near Broad Street, because the child was begotten by a Christian, in consequence of which, as appeared on the affidavits, many Jews, in different parts of the city, had been threatened with death, if they appeared abroad, and had been barbarously treated (g).

In the case of the *King v. Staples* (h), an information was

(c) *R. v. White*, 1 Camp. C. 359.

(d) *R. v. Jolliffe*, 4 T. R. 285.

(e) *R. v. Fleet*, 1 B. and A. 379.

(f) *R. v. Watson*, 2 T. R. 199.

(g) *R. v. Orme*, 2 Salk. 224, and see 1 Ld. Ray. 486. *R. v. Osborne*, Sess. C. 260. 2 Barnard. 138, 166. Kel. 230.

(h) And. 228. Dig. L. L. 80. See also Loft 462. So an information was granted for these words, in a letter to a mayor. "I am sure you will not be persuaded from doing justice by any little arts of your town-clerk, whose con-

granted against the defendant, for having published, in a newspaper called the *York Journal*, that Richard Thompson, an alderman of York and a justice of the peace, was scandalously guilty of telling a lie in divers companies, viz : that the said *Staples* had asked Mr.

Thompson's pardon for publishing, in the same newspaper, [*277] that he, Mr. Thompson, was married *to one Mrs.

W., and, upon granting the information, Page J. observed, that the applying of such words to a magistrate was an aggravation.

The defendant, *Staples*, published in a newspaper, an affidavit of bastardy, which he stated to have been sworn before Sir W. Billers, a magistrate, by a woman, without its having been read by her ; and the court, on granting the information, were of opinion, that the publication of the affidavits was punishable, though no scandalous reflections were made upon the case, especially as they tended highly to defame a magistrate.

The defendant (*i*), in a conversation about a warrant which had been granted by Mr. Kent, a justice of the peace, asked if Mr. Kent was a sworn justice, and being answered that he was, replied, " If he is a sworn justice, he is a rogue and a forsworn rogue ;" but the court refused an information, saying, it is not the same insult and contempt as if spoken to him in the execution of his office, which would make it a matter indictable. So where the defendant (*k*) said of a justice of the peace, " He is an old rogue for sending his warrant to me," the court refused an information, leaving it to the party to proceed by indictment.

[*278] *Where the libel imputed to a naval (*l*) commander the want of courage, knowledge, resolution, and veracity ; to a peer (*m*), that he acted improperly as a president of a court-martial, and that he had been guilty of perjury, the court granted informations. The defendant (*n*) published, in a newspaper en-

summate malice and wickedness against me and my family will make him do any thing, be it ever so vile." *R. v. Waite*, 1 Wils. 22.

(*i*) *The King v. Pocock*, Str. 1157.

(*k*) *R. v. Lee*, 12 Mod. 514.

(*l*) Trin. 32 G. II. *the King v. Dr. Smollett*.

(*m*) *The King v. Philip Thicknesse*, Esq. Hil. 3 G. III. D. L. L. 86

(*n*) Tr. T. 1 G. III. Dig. L. L. 83.

titled *The Gazetteer*, the following libel on the Earl of Clanricarde, whose countess, to whom he had been some time married, was then living, "Last night the Right Honourable the Earl of Clanricarde was married, at St. Mary's Church, to Madame Carolina, a celebrated dancer, belonging to the theatre at Smock Alley, and last Saturday they appeared in the boxes at Crow Street Theatre: she had jewels on computed at upwards of £3000." An information was granted. So where the libel (*o*) imputed treasonable designs to a nobleman, an information was granted. And the court will grant informations without regard to the rank [^{*279}] (*p*) or dignity of the parties traduced, whenever their immediate interference appears to be necessary for the purposes of justice (*q*).

An information was exhibited against the defendant Brown, for printing and publishing in a newspaper, called "*The Royal Chronicle*," a libel (*r*), entitled "An authentic narrative of several particulars relating to the death of Miss Frances Lynes, whose ghost is supposed to have haunted a house in Cock Lane, West Smithfield, for many nights past," tending to traduce and vilify the reputation of one William Kent, and to represent and cause it to be believed, that the said William Kent had, by artful means and circumstances, obtained and procured the last will and testament of the said Frances Lynes, spinster, since deceased, to be made, and unjustly to cause the validity of the said will to be called in question, and also to raise groundless suspicions concerning the death of the said Frances Lynes; and also to cause a false and scandalous report raised and propagated by means of public newspapers, that the spirit or ghost of the said Frances Lynes haunted the house of one Parsons in Cock Lane, to be believed and credited in order to injure and oppress the said William Kent.

*Mr. Willy Sutton was tried for the murder of Miss Bell, at the Old Bailey, on which occasion his innocence [^{*280}]

(*o*) Doug. 387. So against the mayor of a town, for sending to a nobleman a license to keep a public house. Mayor of Northampton's case, 1 Str 422. So for representing a bishop as a bankrupt. Hil. T. 1812. Russel 228.

(*p*) Doug. 387. *R. v. Bate*.

(*q*) Bac. Ab. tit. Lib. 494.

(*r*) E. T. 2 G. III. D. L. L. 84.

appeared to be so clear, that the jury interfered before the learned judge, who presided, had begun to sum up the evidence. An information was afterwards granted (s) against Thomas Holland for writing a libel on Sutton, in a pamphlet, entitled "A most circumstantial account of that unfortunate young lady, Miss Bell, otherwise Sharpe."

It is not necessary, as a foundation for an information, that the libel should charge a criminal act; such an information has been granted, where the object of the libel was to hold the applicant up to ridicule (t). But it seems that, in general, the imputation must be of a personal nature to induce the court to interfere, and that it is not sufficient that it tends to lessen a man (u) in his trade.

In the case of the *King v. Roberts*, an information was refused against the defendant (x) for having published, in a [*281] newspaper, that Ward's pills and drops had done great mischief in twelve different cases, and that they were a compound of poison and antimony.

When a motion (y) was made for an information against the defendant for publishing reflections upon the African Company in one of the newspapers, by charging them with having supported their trade by treachery and fraud, the court refused to interfere, considering the matter nothing more than a dispute upon a matter of trade; but the court granted a rule to show cause why an information should not be granted for a libel against the New-York Buildings' Company, charging them with raising the value of their stock by getting £100,000 under (z) the credit of their seal.

In general where there is reason to suppose, from the circumstances under which the party published, that the act did not proceed from a mere malicious intention, the court will not interfere by granting an information.

(s) Dig. L. L. 82. East. T. 1 G. III. *R. v. Holland*.

(t) *R. v. Benfield*, 2 Burr. 985. As for singing songs in the streets, reflecting on the prosecutor's children, with intent to destroy her domestic happiness. *Ib.*

(u) Andr. 229. 2 Barnard. K. B. 183. Dig. L. L. 90, c. 3. Bac. Ab. 492

(x) Dig. L. L. 90. Bac. Ab. tit. Lib. 492.

(y) *The King v. Roberts*. Dig. L. L. 89. 2 G. II. 1729.

(z) 2 Barnard. K. B. 114. *R. v. Nutt*, D. L. L. 78.

The defendant (*a*) advertised, that one Maddox, an apothecary, had personated Dr. Crow, a physician, and taken his fees, and an information *was refused, the apothecary [*282] not pretending to deny the charge. When a man advertised in a public newspaper, that his wife had eloped from him, and cautioned all persons against trusting her, an information for a libel being moved for, it was denied, because it was the only way (*b*) the husband could take to secure himself.

It was advertised, in one of the newspapers (*c*), that Lady Mordington kept an assembly in Moorfields, upon which Lord Mordington advertised, that the person calling herself Lady Mordington was an impostrix, and that there was no such person, except his wife, who always lived with him. Upon motion for an information it was refused by the court, since the term impostrix was properly applied to one assuming the title without any right.

So where the imputation is contained in a petition drawn up for the purpose of obtaining redress for an injury, and not with an intention to asperse the prosecutor, the court will not grant an information, though the publication impute fraud to the prosecutor, since it is no more than is alleged in every bill in chancery.

*The defendant (*d*) complained, in a writing directed [*283] to General Wills and the four principal officers of the Guards, in order to be presented to the king, that Captain Carr, after inducing him to part with a warrant for some money due to him from government, under the pretence of procuring payment for him, received the money, and refused to pay it to the defendant. Upon motion for an information, the court held that the petition was no libel.

Miss Mary Jerome (*e*), a Quaker, residing at Nottingham, having acted in disobedience to the rules prescribed by the sect of which she was a member, by frequenting places of public diversion,

(*a*) *R. v. Bickerton*, Str. 498. *R. v. Webster*, 3 T. R. 338. Dougl. 270, 371.

(*b*) *R. v. Enes*, Andr. 229. D. L. L. 89.

(*c*) *R. v. Jenneur*, Easter 8 G. II. Bac. Ab. tit. Lib. 492.

(*d*) *R. v. Bayley*, supra 257, and vol. I, 315. Andr. 229. 3 Bac. Ab. tit. Lib. 492.

(*e*) 2 Burn's Ecclesiastical Law 779. Dig. L. L. 39.

going into mourning for the death of a relation, and by other transgressions of a similar nature, the society, after many fruitless remonstrances and other useless attempts to reclaim her, proceeded at last in the customary way to pronounce the sentence of expulsion, which, having been approved of at monthly meeting, was afterwards read by the defendant, Francis Hart, as clerk of their meeting. The sentence, after charging Miss Jerome with having imbibed erroneous notions, contrary to Scripture doctrine and *having acted in various parts of her conduct very inconsistently with a life of self-denial, and of having neglected to attend the meetings for divine worship, and reciting the fruitless attempts of the society to reclaim her from error, and to bring her to the acknowledgment of truth, both in judgment and practice, proceeded to declare her no longer in unity with the society. Miss Jerome, being acquainted with this proceeding, sent her maid servant to the defendant for a copy of the sentence, which he transcribed and enclosed to her under cover; but upon application to the court for an information against the defendant, they refused even a rule to show cause.

Next, as to the rules prescribed to those who apply to the court for leave to file criminal informations. In general the applicant must waive his right of action (*f*); and this is an advantage which the defendant derives from this mode of proceeding; for, if convicted under an indictment, the prosecutor would still be at liberty to bring his action to recover damages. Where, however, the court, on hearing the whole matter, are of opinion that [*285] it is a proper subject for an *action, they will give the party leave to bring (*g*) it.

The court (*h*) will not grant an information, unless the application be made recently after the cause of complaint shall have arisen (*i*).

(*f*) *R. v. Sparrow*, 2 T. R. 198. The prosecutor may be put to his election before information granted: after that time it is of course to stay proceedings in an action for the same libel. *Ib*.

(*g*) 2 T. R. 198.

(*h*) *Bac. Ab. tit. Libel* 492.

(*i*) *Prideaux v. Arthur*, *Lofft* 393. An application for a criminal information against a magistrate must be made so early in the second term after the offence, as to enable him to shew cause in that term. *R. v. Marshall*, 13 *East*. 332.

Where the same libel reflects on several, it is not necessary that all should join in the application, or that the names of all should be specified, since the conviction on one information would be a bar to any other; it being one single offence, though every person injured would severally be entitled to maintain an action (*k*).

The application must be accompanied with affidavits, clearly and specifically stating the circumstances of the case (*l*); these ought not to be entitled, and if they are, cannot be read: those *produced, on showing cause, may (*m*) or may not be [*286] entitled; but all affidavits, after the rule is made absolute, must be entitled (*n*).

On a motion for an information against A. an affidavit, in a motion against B., cannot be read, since the person who made it would not be liable to an indictment for perjury, though it should be false (*o*). But in the case of the *King v. Jolliffe* (*p*), a criminal information having been granted against the defendant, he, before the trial at Nisi Prius, distributed hand-bills in the assize town, vindicating his own conduct, and reflecting upon the prosecutor's. This matter being disclosed to the judge at Nisi Prius, was held to be a sufficient ground to put off the trial; and that affidavit having been returned to the court of King's Bench, another information was granted on it against the defendant; the affidavit taken at Nisi Prius being considered as taken under the authority of the court above. The affidavit should set forth the libel (*q*), its application, and the fact of *publication by the person against whom the [*287] information is prayed.

And where the application of the libellous matter is indifferent, the court has refused to grant the information, saying, that they required a seeming and apparent application to be made (*r*). A.

R. v. Taylor, Nolan 204. And it seems that such an application would not be allowed in the 2d term, where an assize had intervened. *R. v. Herries*, 13 East. 270, and see *R. v. Bishop*, 5 B. and A. 512.

(*k*) *R. v. Griffin*, R. T. Hardw. 39.

(*l*) *Prideaux v. Arthur*, Lofft. 393.

(*m*) 1 Str. 704. Andr. 313.

(*n*) 6 T. R. 642.

(*o*) 11 Mod. 141.

(*p*) 4 T. R. 285.

(*q*) It is sufficient to set forth a copy of the libel, without annexing the libel itself. *R. v. Chappel*, Burr. 402.

(*r*) *Fitzgibb*. 57. pl. 7. D. L. L. 97. Bac. Ab. tit. Lib. 493.

stated in his affidavit, that B. had brought him a challenge from C. and that B. had refused to make affidavit that C. had sent it; but the court held this evidence to be insufficient to warrant them in granting a rule nisi for a criminal information against C (s).

It has frequently (t) been decided, that it is necessary for the party praying an information to produce an exculpatory affidavit, denying the truth of the charge, since though the truth be no ground of justification on an indictment for a libel, yet it is a sufficient reason why the court should not interfere in an extraordinary way. But though the court, in general, require that the affidavit shall directly (u) and pointedly aver "the prosecutor's innocence [*288] of the charge, the rule admits of some exceptions: as where the party charged is abroad, and then the person making the application in his behalf is expected go as far in his affidavit as the nature of the case admits of, by swearing to letters or other intelligence within his reach (x).

So where the charge is general (y), no exculpatory affidavit is required, since it would be absurd to require a man to swear that he was not a traitor or a thief: neither is it necessary where the party is accused of having used criminal language in parliament, since by the express provision of the Bill of Rights, what passes there cannot be questioned elsewhere (z).

Where a libel stated that the Duke of Athol was held in such general abhorrence in the Isle of Man, if he should obtain an act, then depending in parliament, it would occasion (a) a revolt, the court held, that no affidavit from the duke was necessary.

Where the libel reflects on a public body of men, an information will be granted, without any exculpatory affidavit, on an

(s) *R. v. Willet*, 6 T. R. 294.

(t) Str. 498. Andr. 229. 3 Bac. Ab. tit. Lib. 492. Barnard. K. B. 13. *R. v. Miles*, Doug. 184. *R. v. Wright*, 2 Chitty 162. So an information was refused to the first sender of a challenge. *R. v. Hankey*, 1 Burr. 316.

(u) *R. v. Miles*, Doug. 283. It is usual to negative the charge in the words of the charge. *R. v. Wright*, 2 Chitty's Rep. 162.

(x) *R. v. Bate*, Doug. 387.

(y) *R. v. Bate*, Doug. 387. *R. v. Haswell*, ib.

(z) 1 W. and M. sess. 2, c. 2, art. 9.

(a) Doug. 387, in the note.

affidavit, stating the *purchase of the newspaper contain- [*289]
ing the libel, and that the defendant was the publisher or
proprietor of the paper (b).

After the rule to show cause has been granted upon the prosecu-
tor's affidavits, it seems that affidavits in confirmation may be pro-
duced; but that a supplementary affidavit, if introductory of new
matter, is not admissible: but if the new affidavit be partly con-
firmatory and partly consist of new matter, the court will not wholly
reject it, but distinguish between (c) what is new and what is con-
firmatory. Though the affidavits of the prosecutor should be contra-
dicted by those of the defendant, in some circumstances, the court
will nevertheless grant the information, if strong probable ground be
laid (d).

The defendant (e) showed for cause against a rule for an informa-
tion, that the charge of perjury on which the motion was
founded was true; but Sir J. Pratt, C. J. said, "In [*290]
all cases, informations for libels go, unless you can show
the court some probable cause for them to believe you did not pub-
lish it. Now, if you had denied it, it would have signified nothing;
for then affidavit stands against affidavit; therefore, the information
shall go, that the fact may be tried." And Fortescue, J. said, "It
would be a strange thing, if a man should be allowed to justify
when an information is prayed against him, and should not be allow-
ed to justify in the information itself when it is gone."

But in the case of the *King v. Bickerton*, the chief justice de-
clared, that, though truth be no justification for a libel, as it is for
defamatory words, yet it will be sufficient cause to prevent the ex-
traordinary interposition of the court, and induce them to leave it

(b) *R. v. Williams*, 5 B. and A. 595, for a libel on the clergy of the diocese of
Durham. So also in the case of *R. v. Jenour*, 13 G. II; *R. v. Alderton*, 28 G.
II. *R. v. Holloway and Allen* 15 G. III. for publishing a libel on the justices of
the peace for the county of Middlesex, in a pamphlet called the Wit Trap,
charging them with ignorance and corruption in the execution of their office.

(c) *The King v. Kinaston*, 2 Kel. 178. Dig. L. L. 55.

(d) *The King v. Haswell and Bate*, Doug. 372.

(e) *The King v. Dormer*, Barnard. K. B. 13. Dig. L. L. 77. *R. v. Draper*,

to the ordinary course of justice before a grand jury (*f*). And with this doctrine the modern practice has conformed.

The prosecutor (*g*) founded his application upon an affidavit, stating, that the defendant confessed to him the publication of the libel; on the other hand it was shown, that the defendant never made any such confession, yet, since the fact of publication was not denied, the information was granted.

[*291] *By a rule E. T. 5 G. II. where a person has obtained a rule nisi for a criminal information, and upon showing cause the rule is discharged, the party who (*h*) made the motion shall pay the costs. But this has been held to be discretionary.

A joint information against several cannot be founded on distinct facts for informations against each (*i*).

When an information is filed by leave of the court, it is provided by st. 4 and 5 W. and M. c. 18, s. 2, that, where the defendant is acquitted, the court shall be authorized to award costs to the defendant, unless the judge shall, at the trial, certify that there was reasonable cause. But it has been held to be compulsory on the court to grant costs to the defendant in case of his acquittal, no certificate having been granted. The certificate must be granted at the trial, and it is afterwards too late to inquire whether there was probable cause for the prosecution (*k*).

[*292] The process which has been issued in case of *libel has been either against the person of the offender or his papers.

1. Against the person.

The defendant (*l*), Derby, having been committed upon the warrant of a secretary of state, for publishing a seditious libel, called the *Observer*, No. 74, was brought before Chief Justice Parker, by habeas corpus, and by him discharged upon entering a recognizance to appear on the first day of term. Upon that day the de-

(*f*) *R. v. Bickerton*, Str. 498.

(*g*) *R. v. Sharp*, Andr. 384.

(*h*) See 2 Kel. 61. pl. 8. Dig. L. L. 97. Where a complaint for an information against a justice of the peace proved to be frivolous, the attorney, as well as the complainant, was ordered to pay the costs. *Rex v. Fielding*, 2 Burr. 654. 2 Ld. Kenyon 386.

(*i*) *R. v. Haydon*, 3 Burr. 1270.

(*k*) *R. v. Woodfall*, 2 Str. 1131. Dig. L. L. 98.

(*l*) *R. v. Derby*, Fortescue 140. Dig. L. L. 31.

defendant took several exceptions to the commitment, and moved to be discharged, insisting, principally, that the commitment previous to indictment, presentment, and conviction for the offence imputed to him, was illegal and contrary to st 25 E. III. st. 5, c. 4; but the court held that he was not entitled to his discharge.

John Wilkes (*m*) was committed upon a secretary of state's warrant for writing a seditious libel, entitled "The North Briton," No. 45. He was afterwards brought up by habeas corpus, into the Court of Common Pleas, and being (*n*) privileged *as a member of the House of Commons, was discharged [*293] without bail.

In the above case (*o*) the court considered the warrant of a secretary of state to be of the same force with that of a justice of the peace, and that neither a secretary nor justice ought to issue a warrant upon his own private knowledge; but that it was unnecessary to state upon the face of the warrant the evidence upon which it was granted, or even to state in the warrant that it was granted upon any charge made. And in the same case it was held, that the words contained in the warrant "for being the author and publisher of a most infamous and seditious libel, *entitled [*294] "The North Briton," was a sufficient description of the offence, since it was known specifically by that name.

(*m*) 2 Wilson 159.

(*n*) By the resolutions of both houses of parliament, it has been decided, that privilege does not lie in the case of a seditious libel. Journal of the Lords, Die Martis, 29 Novembris, 1763.

The 3rd resolution of the House of Commons was read—"Resolved, by the Commons in Parliament assembled, that privilege of Parliament does not extend to the case of writing and publishing seditious libels, nor ought to be allowed to obstruct the ordinary course of the laws, in the speedy and effectual prosecution of so heinous and dangerous an offence," and it being moved to agree with the Commons in the said resolution, it was, after a long debate, resolved in the affirmative. In the case of *Burdett v. Abbott*, 14 East. 1. 5 Dow. 165. 4 Taunt. 401, which was an action against the speaker of the House of Commons for trespass and false imprisonment, it was held that the speaker of the House of Commons might lawfully commit a member of that house, in pursuance of an order of the house to that effect, upon a resolution of the house, that the plaintiff had been guilty of a breach of privilege, in printing a libellous and scandalous paper, reflecting on the just rights and privileges of that house.

(*o*) See Dig. L. L. 51.

In the case of *Butt v. Conant* (*p*), the authority of a justice of the peace to issue his warrant against the publisher of a libel, and to commit, in default of sureties, was much discussed, and after a consideration of all the previous precedents, it was decided that justices of the peace have such authority, as well in the case of libel as of all other offences, over which, as justices, they have jurisdiction.

In the above case, the libel reflected on the characters of two noblemen, the Late Lord Ellenborough, C. J. and Lord Castlereagh. But it seems to be clear that the general doctrine there laid down would apply to all cases of libels, whether they were illegal, as reflecting on the characters of individuals, or for any other mischievous tendency, affecting the public (*q*).

[*295] *In *Leach's* case (*r*) the warrant from the secretary of state was couched in the following terms: "These are, in his Majesty's name, to authorize and require you (the messengers), taking a constable to your assistance, to make a strict and diligent search for the authors, printers, and publishers of a seditious and treasonable paper, entitled 'The North Briton,' No. 45, and them, or any of them, having found, to apprehend and seize, together with their papers, and bring in safe custody before me, to be examined concerning the premises, and further dealt with according to law." The messengers, under this warrant, seized Mr. Leach and imprisoned him for some time; but on its being found that he was neither author, printer, nor publisher, he was discharged by the Earl of Egremont's order, without even having appeared before him. After a verdict for the plaintiff, the defendants carried the matter, by a bill of exceptions, to the court of King's Bench, when the single point decided was, that the defendants could not justify, inasmuch as they had not acted in obedience to the warrant (*s*).

(*p*) 1 B. and B 548.

(*q*) The publishers and distributors of impious and seditious libels may be immediately taken up and held to bail. It is not necessary to stand by and see the mischief spreading without attempting to interrupt its progress; it would be a reproach to the laws of the country if it were so; and if the magistrates might not arrest the torch in the incendiary's hand, and before it had set fire to the building. Per Leycester, J. in his charge to the jury, Carnarvon Summer Ass. 1819.

(*r*) 11 St. Tr. 307.

(*s*) By a resolution of the House of Commons it was declared, that general

"It is enacted by the 43 G. III. c. 58, s. 1.—“That [*296] whenever any person is charged with any offence for which he may be prosecuted by indictment or information in the King's Bench (not being treason or felony), and the same shall be made to appear to any judge of the same by affidavit or by certificate of the indictment or information being filed against such person in the said court for such offence, such judge may issue his warrant under his hand and seal, and thereby cause such person to be apprehended and brought before him or some other judge of the same court, or before some one justice of the peace, in order to his being bound, with two sureties, as the said warrant shall express, with condition to appear in the said court at the time mentioned in the said warrant, and to answer all and singular indictments or informations for any such offence ; and if he shall neglect or refuse to become so bound, such judge or justice may respectively commit him to the common gaol of the county, city, or place, where the offence shall have been committed, or where he shall have been apprehended, there to remain until he shall become bound as aforesaid, or be discharged by order of the said court, in term time, or by one of the judges of the said court, in vacation ; and the recognizance to be thereupon taken shall be returned and filed in the said

*court, and shall continue in force until such person shall [*297] have been acquitted of such offence, or in case of conviction, shall have received judgment for the same, unless sooner declared by the said court to be discharged.” And the same act further provides, “ That in case any defendant be committed, either by virtue of such warrant, or by virtue of any writ of *capias ad respondendum*, for want of bail, a copy of the indictment or information shall be delivered to him or to his gaoler, with notice that unless he shall within eight days enter an appearance, plea, or demurrer, to such indictment or information, an appearance and the plea of not guilty will be entered in his name ; and that if such defendant shall neglect eight days to enter an appearance, and to plead or demur, the prosecutor may, on affidavit of the service of the copy and notice

warrants in the case of libel are illegal. Journ. Comm. 22 Ap. 1766. And such were, by a subsequent resolution, declared to be illegal in all cases. Ib. 25 Ap. 1766.

enter an appearance and the plea of not guilty, and proceed in the usual course : and that, upon acquittal, the judge before whom the trial is had (though not a judge of the King's Bench) may order such defendant to be discharged out of custody as to his aforesaid commitment."

With respect to the seizure of papers, it is said to have been resolved, by all the judges, that where persons write, print, or sell any pamphlet, scandalizing the public or private persons, such [*298] *books may be seized, and the person punished by law (*t*).

The practice of issuing a general warrant to seize the papers of a suspected person, appears to have been frequently resorted to, in former times, with great abuse, of which the case of *Lord Coke* himself furnishes an instance ; whose papers were seized and carried to the secretary's office, with some valuable securities, which were never returned to him (*u*). Insignificant however is a loss of such a nature when compared with the more serious evils incident to such a procedure, the grievous invasion of domestic peace and security, and the facility with which a person might be made responsible for the contents of writings never in his possession, or deprived of those necessary for the purpose of his defence.

A warrant (*x*) was issued in the name of the Duke of Newcastle, one of the secretaries of state, directed to two of the King's messengers, requiring them, taking a constable, to make a diligent search in the house of Dr. Earbury, the author of a treasonable paper entitled "The Royal Oak Journal," for all papers of [*299] whatsoever *kind in his custody, and to bring the said papers before him ; the messengers, without taking a constable to their assistance, entered the defendant's house, seized his papers, and brought them before Mr. De La Faye, who was the duke's secretary and a justice of the peace.

The defendant afterwards applied to the Court of King's Bench to have his papers restored to him, insisting that a secretary of state could not legally grant a warrant to seize a person's papers. Lord C. J. Hardwicke said, that as to seizing the defendant's papers he

(*t*) 4 Read. St. Law 154.

(*u*) Dig. L. L. 33.

(*x*) 2 Barnard. K. B. 346. Dig. L. L. 33.

would not give any opinion whether it was legal or not ; that the court of King's Bench could not grant a rule upon the messenger who did seize them to restore them, and therefore that the question was not properly before the court for their determination.

But in the great case (*y*) of the seizure of papers, it was decided that a secretary's warrant to search for papers was illegal ; and *Ld. Camden, C. J.* observed, " If this point should be determined in favour of the jurisdiction, the secret cabinets and bureaux of every subject in the kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of

*state shall think fit to charge or even suspect a person to [*300] be the author, printer, or publisher of a seditious libel.

This power so assumed by a secretary of state, is an execution upon all the parties' papers in the first instance ; his house is rifled—his most valuable secrets wrested out of his possession, before the paper, for which he is charged, be found criminal by any competent jurisdiction, and before he is convicted either of writing, publishing, or being concerned in the paper. This power of the secretary is not supported by one single citation from any law book extant—it is claimed by no magistrate in the kingdom but himself. Papers are the owner's goods and chattels,—they are his dearest property, and are so far from enduring a seizure, that they will hardly bear an inspection ; and though the eye cannot, by the law of England, be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of the goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power ? I can safely say there is none ; and therefore it is too much for us, without such authority, to pronounce a practice to be legal, which would be subversive of all the comforts of society."

" There is no authority to show that libels *might be [*301] seized, except the opinion of the twelve judges, at the close of the reign of *C. II.*, who gave it as their opinion, that no one could legally expose to the public any thing that concerned the af-

(*y*) *Entick v. Carrington and others*, 11 St. Tr. 317. 19 Howell's St. Tr. 1029.

fairs of the public, without license from the King. This was quoted by C. J. Scroggs, on the trial of Harris for a libel, who extended the doctrine to the seizure of all books, pamphlets, and writings, on matters of public concern."

And again, "It is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence. I wish some case had been shown where the law forceth evidence out of the owner's custody by process."

"In the criminal law such a proceeding was never heard of; and yet, there are some crimes, such, for instance, as murder, rape, robbery, and housebreaking, to say nothing of forgery and perjury, that are more atrocious than libelling; but our law has provided no paper search upon those occasions to help forward the conviction. Whether this proceedeth from the gentleness of the law, or from the consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say."

"Observe the wisdom as well as the mercy of the law. The strongest evidence before trial, being only *ex parte*, is [*302] but suspicion,—it is not *proof: weaker evidence is a ground of suspicion; though in a lower degree: and if suspicion at large should be a ground of search, especially in case of libels, whose house would be safe? Upon the whole, we are of opinion, that the warrant to seize and carry away the parties' papers in case of a seditious libel, is illegal and void."

And the House of Commons (z) afterwards came to a resolution, declaring the seizure of papers, in the case of libel, to be illegal.

Since a criminal proceeding is in its nature local, the offence must be laid and proved to have been committed in the county within which the bill (a) is preferred. And the indictment may be tried at the quarter sessions, before the justices of the peace as well as before the justices of Oyer and Terminer (b).

With respect to the technical mode of framing an information or indictment, little remains to be added to the observations already made on the subject of the declaration (c).

(z) Jour. Comm. 25th April, 1766.

(a) 4 Read. St. Law 155. 8 Mod. 328. Dig. L. L. 97 *infra*, tit. Evidence.

(b) Haw. 8. s. 88. R. v. Summers, 1 Lev. 193. (c) *Supra* vol. I.

All who are in any way concerned in the composition, writing, or printing of the libel, with a view to publication, may be joined in the information *or indictment, and charged as [*303] principals (*d*).

It is not necessary to allege that the matter published is false; such an allegation need not be proved, though it be made on the record (*e*); but the illegality of the publication must be averred by means of the word *maliciously*, or by some equivalent term (*f*).

In an indictment, as well as in a declaration, the averment of extrinsic facts is unnecessary, where the criminal quality of the publication may be collected from the contents; such averments are essential where the terms of the libel are independently of particular extrinsic facts, innocent or unmeaning, but are in reality noxious and illegal, in connection with the facts to which they relate. The mode of averring such extrinsic circumstances, and explaining the sense of the libel in its connection with those facts, by means of the ordinary technical links, has already been so far remarked upon that further comment *is perhaps [*304] unnecessary. Where an information alleged that a libel was published of and concerning the government, and the libel was written in such terms, that an ordinary person, on reading it, would understand that it was written of the government of the country, it was held, that any extrinsic allegation, for the purpose of explaining the meaning, was unnecessary (*g*). And where the information alleged that the defendant, with intent to insinuate and cause it to be believed, that divers liege subjects of the King, had been inhumanly cut down, maimed, and killed, by certain troops of our lord the King, unlawfully and maliciously published a libel of and concerning the government of this realm, and of and concerning the said troops, and the only innuendo was applied to the word

(*d*) *R. v. Benfield*, 2 Burr. 983, pl. 3, it was held, that a joint information lay against two, for singing a libellous song on A. and B., which abused first A., and then B.; and it was held, that if each had sung separate stanzas, the one reflecting on A.; the other on B.; the offence would still have been joint.

(*e*) *R. v. Burke*, 7 T. R. 4.

(*f*) *Sty.* 392, per *Roll. C. J.* 1 Vin. Ab. 533.

(*g*) *R. v. Burdett*, 4 B. and A. 314.

dragoons in the libel, meaning the said troops of our said lord the King, and meaning thereby, that divers liege subjects of our lord the King had been inhumanly cut down and killed by the said troops of our said lord the King; it was held, on motion in arrest of judgment, that this was sufficiently certain, without specifying what particular troops were meant (*h*).

(*h*) *Ib.*; and see *R. v. Horne*, Cowp. 682 *supra*, vol. I. p. 391. To the illustrations already adduced, v. I. p. 407, to show the nature and use of prefatory averments and innuendoes, may be added the following:—*Goldstein v. Foss*, 6 B. and C. 152. In the introductory part of the declaration, it was alleged, that the plaintiff was the secretary of a society called “The Society of Guardians, for the protection of Trade against Swindlers and Sharpers,” and the nature and object of the society was also averred; the declaration then alleged the publishing of the libel, as a printed report, by the secretary, containing, (*inter alia*,) that the plaintiffs were reported to the society as improper to be proposed to be balloted for as members thereof, with an innuendo, thereby then and there meaning that the plaintiff was a swindler and sharper, and an improper person to be a member of the said society. And it was held, on a motion in arrest of judgment, that the libel was not sufficiently connected with the introductory matter, and that without such matter the words were not in themselves actionable.

In the case of *Stockley v. Clement*, 4 Bingham 162, the first count alleged, that the plaintiff was lawfully possessed of a bill of exchange, accepted by Frances Page Turner, widow; that such acceptance was a true and genuine acceptance, and that the defendant, intending to charge the plaintiff with having forged and feloniously uttered the said bill of exchange, published of and concerning the said plaintiff and the said bill of exchange, the following libel:—

“To bill-brokers and others—caution—reward—Whereas information has been given to me, that attempts have been made to obtain the discount of a bill of exchange, bearing date, London, May 26th, 1825, and purporting to be drawn by one John Stockley, upon and to be accepted by the Dowager Lady P. Turner, for £6000, with interest, payable twelve months after date, to the order of the said J. Stockley.—I do hereby give notice, on behalf of the Dowager Lady P. Turner, that she has not accepted such bill, and that if her name should appear on any such instrument, the same has been forged; or her handwriting to the said acceptance of the said bill, if genuine, has been obtained by fraud, in total ignorance on her part, of the intended effect of the signature. Any person who will give positive information to me of the party in possession of the said instrument, shall be handsomely rewarded. Thomas Binns.”

After a verdict for the defendant, the court held, that, at all events, the action could not be supported without an innuendo, in stating the alleged libel, applying the charge to the plaintiff.

The court also intimated a strong opinion, that, even with an innuendo, the

*Unless a libellous and criminal meaning be either apparent on the face of the alleged libel, or *can be collected from the terms of the libel, as connected with extrinsic circumstances, no innuendo will either make the publication criminal, or subject the publisher to a civil action. (*i*).

An indictment, that the defendant scripsit, fecit, et publicavit, *seu* scribi fecit, et publicari causavit, has been held to be too uncertain (*k*).

When some special intention is essential to the *offence, such intention must be described according to the truth and the nature of the offence. Where the libel has been published to the prosecutor only, though its tendency be to vilify and degrade him in his professional character, it should be alleged to have been published with intent to provoke a breach of the peace (*l*). So where the indictment is founded on a libel written to degrade the memory of one deceased, it should be alleged to have been published with a design to bring contempt on the family of the deceased, and to excite his relations to a breach of the peace (*m*).

The most usual plea in an indictment or information, is the general one of *not guilty*, by which the defendant puts himself generally upon the country for his deliverance, and is entitled to take advantage of every defect in the evidence for the prosecution; or to rebut that evidence by counter proof, tending to convince the jury, either that the act imputed was not committed; or, admitting the publication, to show from the context (*n*), or other circumstances, either that the matter published was not criminal in its nature; or, if criminal, that it was published inadvertently (*o*), and without

action could not have been supported, as the alleged libel merely stated that a bill had been drawn, but threw no imputation on the drawer.

(*i*) *Supra* v. I. p. 393. And see *R. v. Alderton*, Sayer 280. *R. v. Burdett*, 4 B. and A. 314. *R. v. Horne*, Cowp. 682. *Stockley v. Clement*, 4 Bing. 162 *supra*. *Goldstein v. Foss*, 6 B. and C. 152, *supra* 305.

(*k*) 8 Mod. 328, and see v. I. p. 358.

(*l*) *R. v. Wegener*, 2 Starkie C. 245.

(*m*) *R. v. Topham*, 4 T. R. 126.

(*n*) *R. v. Lambert and Perry*, 2 Camp. C. 398.

(*o*) *R. v. Lord Abingdon*. 1 Esp. 226.

*any guilty knowledge (*p*) ; or that it was published under circumstances which the law recognizes as constituting either an absolute justification or excuse, independently of the question of intention, or a qualified justification dependent on the actual intention and motive of the defendant (*q*).

(*p*) In the case of the *King v. Holt*, 5 T. R. 444, Lord Kenyon, C. J. observed, if the defendant could have shown that he had published the paper in question without knowing its contents, as that he could not read, and was not informed of its tendency till afterwards, that argument might have been pressed upon the jury.

(*q*) *Supra* 210.

CHAPTER XV.

EVIDENCE.

*WITH respect to the nature of the evidence to be [*309] adduced in support of a criminal charge, little need be added to the analogous proofs already mentioned as applicable to civil proceedings; the materials of evidence, and the rules which govern their application are for the most part common to both.

Such evidence in the criminal proceeding relates to the introductory averments, and the act of publication by the defendant of the noxious matter charged (*a*), in the sense imputed by the averments, and with the intention alleged. Whether the introductory averments be proved, is usually matter of fact for the determination of the jury, subject of course to any question of variance from the record.

*A Gazette is evidence to prove an averment that [*310] certain addresses have been presented to the King (*b*).

So the King's Proclamation for the discovery of certain offenders, reciting that outrages have been committed in certain districts, is evidence to satisfy an introductory averment in an information for a libel, that such outrages had been committed (*b*).

An allegation that the defendant was duly elected treasurer of a

(*a*) The court, under the late statute, 9 G. IV. c. 15, has a discretionary power to amend variances between the record and any matter in writing or print produced in evidence.

(*b*) *R. v. Holt*, 5 T. R. 436.

(*b*) *R. v. Sutton*, 4 M. and S. 546.

particular parish, is proved by an entry in the vestry-book, stating, that he was elected to that office at a vestry held after notice (*e*).

In criminal as well as civil proceedings in case of libel, it is unnecessary to give further proof of facts which the alleged libel assumes to be truth (*d*).

*Where the indictment alleges that the prosecutor, at the time of the libel, filled a particular situation, it is sufficient to
[*311] prove a previous appointment, without showing its continuances; for the commencement being shown, the continuance will be presumed (*e*). But in criminal as well as civil cases, unless strict proof of appointment be rendered necessary by the particular mode of averment, proof that a party acts in a public office is sufficient *prima facie* evidence that he really held it (*f*).

In criminal cases, it is usually sufficient to prove a publication to the party defamed (*g*). But it is necessary to prove a publication in the particular county where the offence is charged to have been committed, in all cases where the fact of publication is of the essence of the offence.

The principal decisions on this subject have already been adverted to. The question of publication is ordinarily one of mere fact, to be decided by the jury: but this, like all other legal
[*312] and technical terms involves law as well as *fact; and it is a question for the court, in doubtful cases, whether the facts, when proved, would constitute a publication in point of law.

(*c*) *R. v. Martin*, 2 Camp. 100. Cor. Macdonald, C. B.

(*d*) Supra p. 11, and see the observations of Bayley, J. in *R. v. Sutton*, 4 M. and S. 548. Where the plaintiff alleged that he held a certain office and place of trust and confidence, to wit, the office of overseer of a certain common field, &c. and the terms of the alleged libel treated the plaintiff as holding an office of public trust, and charged him with not having given a proper account of the public property; it was held to be evidence of the averment, although the plaintiff's own witnesses showed that the plaintiff's office was not one of trust and confidence, and that he was not trusted with the receipt of money. *Bagnall v. Underwood*, 11 Price 621, and see *Berryman v. Wise*, 4 T. R. 366, supra p. 2.

(*e*) *R. v. Budd*, 5 Esp. C. 230, which was an indictment for a libel on Lord St. Vincent, in his character of first Lord of the Admiralty. The prosecutor produced his patent.

(*f*) Supra.

(*g*) Proof of such a publication is not sufficient, where the only intent averred is the intent to injure the prosecutor in his profession as an attorney. *R. v. Wegener*, 1 Starkie's C. 543 infra.

In the case of the *King v. Sir F. Burdett* (*h*), the first question was whether there was sufficient presumptive evidence to warrant a jury in finding that there had been an open publication in the county of Leicester, and of this opinion were Abbott, C. J. and Best, J. Secondly, whether what was termed a close publication, by the delivery of the sealed letter in the county of Leicester, to be conveyed into a different county by the post, amounted to a publication in law in the county of Leicester, and of this opinion were Holroyd and Best, Judges. Thirdly, whether proof of such close delivery and subsequent publication, in such different county, constituted an offence of which the jury could inquire on an indictment in the county of Leicester, and of this opinion were Abbott, C. J. and Holroyd, J.

Holroyd, J. also expressed an opinion, that the composing and writing, with the intention afterwards to publish, amounted to a misdemeanor, and that the jury might inquire as to the publishing in another county, in order to prove the defendant's intention in composing and writing in Leicestershire.

*Where a libel is found in a man's own custody, but [*313] exposed on a shelf in a bookseller's shop, the owner is, it is said, guilty of a publication (*i*).

Proof that the defendant procured a number of placards to be printed, from a manuscript, part of which, when printed, he took away, is sufficient to warrant the reading in evidence one of those copies left with the printer (*k*).

Where the defendant had acknowledged himself to be the author of the libel produced in evidence, errors of the press, and some small variations excepted, his counsel objected that the confession was not absolute, and that, therefore, the libel could not be read; but Pratt, C. J. allowed it to be read, saying, that he would put it on the defendant to prove material variances (*l*).

The provisions of the st. 38 G. III. which facilitate the proof of publication in proceedings against the editors of newspapers, have already been adverted to (*m*).

(*h*) 4 B. and A. 95.

(*i*) 12 Vin. Ab. 229. 4 Read. St. Law. 455.

(*k*) R. v. Watson, 2 Starkie's C. 129.

(*l*) R. v. Hall, Str. 416.

(*m*) Supra 43.

[*314] By the st. 60 G. III. and 1 G. IV. c. 9, similar *provisions are made in respect of certain pamphlets containing public news [1].

[*320] *Where the publication of the libel has been proved, either the prosecutor or the defendant (*o*) is entitled to have extracts read from different parts of the same paper or book relating to the same subject.

The sale of every distinct copy of a libel is a separate offence (*p*) ; and, therefore, a conviction or acquittal on an indictment for publishing one copy would be no bar to an indictment for publishing another copy.

It is almost superfluous to observe, in this stage of the present work, that, in criminal as well as civil proceedings, it is for the jury, in all cases of doubtful application, to judge of the defendant's intention to apply the words or libel to the particular subject matter, according to the averments in the indictment (*q*). Thus

[*321] where the *intention to apply defamatory remarks to the prosecutor, is rendered doubtful and ambiguous, by the defendant having left blanks for names, or from his having given merely the initials, or introduced fictitious names, it is always a question for the opinion and judgment of the jury, whether the prosecutor was the party really aimed at (*r*). For this purpose the

(*o*) *R. v. Lambert*, 2 Camp. 398.

(*p*) *R. v. Carlisle*, 1 Chitty 451.

(*q*) *Supra*, vol. I. — In the case of *Yrissari v. Clement*, 3 Bing. 432, the alleged libel contained (*inter alia*) the following passage :—" He lost no time in transferring himself with £200,000 of John Bull's money to Paris, where he now out-tops princes in his style of living, (meaning and intending thereby, that the said plaintiff had fraudulently obtained £200,000 sterling of the money of the English subjects of our sovereign lord the King, and had fled from the country with the same.) It appeared, from the context, that the intention of the writer was rather to charge the plaintiff with fraud on the people of Chili than on the people of England ; and on this ground, after a verdict for the plaintiff, with £400 damages, the court granted a new trial.

(*r*) See the observations and opinions of the judges, *supra* vol. I, p. 54, et sequent.

[1] In the London edition are set forth *verbatim* twelve out of nineteen sections of the act ; but as it can be of no possible use here to reprint them, they are omitted. These sections occupy nearly six full pages of the London edition, viz. : pages 314, 315, 316, 317, 318, 319.

judgment and opinions of witnesses, who, from their knowledge of the parties and the circumstances, are liable to form a conclusion as to the defendant's intention and application of the libel, is evidence for the information of the jury (s).

*Any further observations on the subject of *evidence [*322] to prove general malice seem to be unnecessary. The rule of law on this subject in criminal, is analagous to that in civil proceedings. If the publication, considered either abstractedly or in connection with the extrinsic facts alleged, be calumnious, injurious, and criminal, either because it conveys some offensive and noxious imputation, or exposes an individual to the hatred and contempt, or even to the ridicule of others, and no circumstances appear which, in legal consideration, supply either an absolute or even qualified defence, malice, if material, is yet but a mere inference of law, which the jury are bound to find, according to the direction of the court (t). *If, on the other hand, [*323] there be circumstances which supply a justification or

(s) *Supra* 52. Lord Ellenborough held, that the declarations of spectators, while they looked at a libellous picture, publicly exhibited in an exhibition room, was evidence to show that the figures portrayed were meant to represent the parties alleged to have been libelled. *Du Bost v. Beresford*, 2 Camp. G. 512.

(t) *Supra* 240, and see vol. I. p. 209. 292. In the case of *Levi v. Milne*, 4 Bingh. 195, the defendant published some doggerel verses on the plaintiff, (a bailiff,) describing an inefficacious attempt on his part to arrest a party of whom he was in search. The publication was headed by a wood-cut, styling the plaintiff *Levy the bum*. The jury inquired, whether one shilling would carry costs, and being answered in the affirmative, found a verdict for the defendant. The court, under the circumstances, granted a new trial, on the ground that the jury had taken upon themselves to judge of the law of the case; and Best, C. J. said, it has been urged that, in cases of libel, the juries are judges of the law as well as of fact; but I beg to say that juries are not judges of the law, or, at any rate, not in civil actions. The authority on which that position is grounded, is the 32 G. III. c. 60, which was the famous bill brought in by Mr. Fox, or, more properly, by Lord Erskine; but whoever reads that act, will see that it does not apply to civil actions; it applies only to criminal cases. There is nothing in it that in any way touches civil actions, and the jury, with respect to them, stand in the same situation as they have ever done. I mean, however, to protest against juries, even in criminal cases, becoming judges of the law; the act only says, that they may give a general verdict." And see 4 B. and

excuse, provided the defendant acted honestly, with a view to the occasion, and was not actuated by express collateral malice, then it lies on the prosecutor to prove such express malice, or malice in fact.

Where a publication, with a specific intention is alleged, such intention must be proved accordingly.

*Where a letter is alleged to have been written and sent with intent to provoke the party to whom it has been sent to
[*324] commit a breach of the peace, such intent must be proved as laid. So where the publication is averred to have been made with intent to defame particular magistrates, or to bring the administration of justice into contempt. But allegations of intent are usually divisible, and where two distinct intents are charged, either of which would have supported the indictment, it is sufficient to prove either of them (*u*).

Where the indictment alleged a publication of a libel with intent to disparage and injure the prosecutor in his profession of an attorney, it was held, that the mere proof of a publication to the prosecutor only did not support the indictment, and that the publication ought to have been averred to have been made with intent to provoke and excite the prosecutor to a breach of the peace (*x*).

Where the name of the party calumniated is left in blank, general evidence by those who know him is sufficient for the purpose of proving that he was the person meant; but such evidence *is
[*325] insufficient, if it turn out, upon inquiry, that the witness

A. 131. In the case of *Blackburn v. Blackburn*, 4 Bing. 395, the learned judge left it to the jury to say, whether supposing the alleged libel was a privileged communication, they found express malice. The jury negatived express malice, and found a verdict for the plaintiff, with £50 damages. The court were of opinion, on a motion for a new trial, that the communication was not a privileged one, and that the plaintiff was entitled to retain his verdict. The plaintiff having the defendant's bond, advertised it for sale; the defendant published a statement of the circumstances under which the bond had been given, with this conclusion:—"His object either is to extract money from the pocket of an unwary purchaser, or, what is more likely, to extort money from me." And it was held, that the publication was clearly libellous, and that no proof of express malice was necessary. *Robinson v. M'Dougall*, 4 Bing. 670.

(*u*) *R. v. Evans*, supra vol. I, p. 439. See also vol. I, p. 408.

(*z*) *R. v. Wegener*, 1 Starkie's C. 543. Cor. Abbott, C. J.

derives his conclusion, merely from the terms of another libel, with the publication of which the defendant had no concern (*y*).

In general, it is competent to the defendant to adduce any evidence in contradiction of that which has been adduced on the part of the prosecution. He may show that his delivery of the libel was not a wilful or blamable one, and that he acted under an honest ignorance of the contents or quality of the libel, without knowing or having reason to apprehend that the act was illegal. And though, as has been already seen, a strong presumption of criminal knowledge or cupable connivance is usually and necessarily entertained against booksellers, where libels are sold by their agents, yet, as a man cannot offend criminally, unless some degree of blame or negligence be imputable to him, it seems to be clear that this presumption is not conclusive in its nature, but may be repelled by proof of fraud or surprise, or such other circumstances as are calculated to overcome that reasonable degree of vigilance and supervision which a cautious man ought to exercise in so responsible a vocation.

He may, also, under the plea of not guilty, give in evidence any collateral facts which raise *either an absolute justification, independently of the question of actual intention, [*326] or a qualified justification or excuse dependent on the question of good or evil intention; and also, in the latter case, may adduce such evidence as tends to show that he acted *bonâ fide* for a legal object, and not for any evil or vexatious purpose.

It is not competent to the defendant to show that others have published similar papers, without having been prosecuted (*z*), for such persons have no opportunity given to defend themselves, and one defendant cannot excuse himself by showing that others have also been criminal.

Matters available in mitigation of punishment are usually reserved till after the trial, and are exhibited to the court upon affidavits. In some instances, however, such evidence is received at the trial. Thus, evidence has been received to show that the defendant, when proceedings were instituted, stopped the sale of the obnoxious work (*a*).

(*y*) *Bourke v. Warren*, 2 C. and P. 307.

(*z*) *R. v. Holt*, 5 T. R. 436.

(*a*) *R. v. Hone*, *Manning's Ind.* 193.

CHAPTER XVI.

OF THE TRIAL AND VERDICT.

[*327] *THE verdict in this, as in other criminal proceedings, is either a general verdict of condemnation or acquittal ; or a special verdict, by which the jury find the facts, and refer the questions of law to the court.

The offence consists of the act of publishing the matter set forth on the record, in the sense attributed by the innuendos, with the intention alleged, maliciously without any legal justification or excuse. The fact of publishing the illegal matter, and of its being published in the particular sense alleged, are ordinarily questions of fact for the jury, subject, of course, to the opinion and judgment of the court, whether the facts proposed to be proved would be, when proved, sufficient in point of law, to constitute a publication and to support the innuendos.

Whether the defendant published the alleged libel wilfully and designedly, and whether he did so with the particular intention specified in the *information or indictment, are also questions of fact for the determination of the jury. Till these facts are determined by the jury, the court cannot otherwise then hypothetically form any judgment on the question of guilt or innocence. On the other hand, the quality of the alleged libel, as it stands on the record, either simply or as explained by averments and innuendos, is purely a question of law for the consideration of the court.

This position requires little support from observation or comment ; it rests not only on precedent, but legal analogies, and no obvious

grounds of reason and convenience. Upon a demurrer, motion in arrest of judgment, or writ of error, this question is necessarily one of mere law, and the court is called on to pronounce, whether, assuming the alleged libel to have been published in the sense pointed out by the averments, and with the intention averred, it amounts, in point of law, to a libel. The court, in such cases, must necessarily decide the question of libel, or no libel, as a question of law; it cannot, therefore, be a question of fact; it is obvious that the opinion and judgment of the jury on the subject must be immaterial, when it is considered that the defendant may wholly withdraw the question from their consideration by a demurrer, or that, even after their decision, the question is still open *on the [*329] record, and must be decided by the court, independently of the opinion of the jury, before they can pronounce any penal sentence.

The question remains, whether the publication of the libel alleged was a malicious or wrongful publication; for, though the fact of publishing, and the illegal and noxious quality of the thing published be beyond dispute, yet the act of publication may be perfectly innocent; so far from being illegal, it may have been an act meritoriously done, for the very purposes of justice. And, therefore, as not merely a publication, but a malicious or wrongful publication must be averred, so must such a malicious and wrongful publication be found by the jury, either by means of a general verdict of guilty, which comprehends the whole of the charge, or by a special finding of a malicious and wrongful publication, or, at least, by negating the existence of any legal justification or excuse.

Where the circumstances and occasion of publishing are such as amount to a legal justification or excuse, independently of the question of intention, the existence of those facts is, of course, for the consideration and decision of the jury; but whether, when ascertained, they amount to a legal justification or excuse, is obviously a mere question of law for the opinion and judgment of the court. It is, for instance, a question of mere *fact, [*330] whether the alleged libel was published by way of petition to parliament, and whether it was made according to the course

and order of such like proceedings in parliament, but whether the occasion justifies a publication so made, is a question of law.

So, again, it is a question of law, whether the occasion and circumstances of the publication furnish a *qualified* justification or excuse dependent on the actual intention of the defendant ; but when that is the case, and the guilt or innocence of the defendant turns upon the question, whether he acted with an evil and mischievous intention, or *bonâ fide*, and with a view to some legal object, the question of malicious intention is a conclusion of fact to be drawn by a jury, on a consideration of the terms of the alleged libel, and all the circumstances of the case. If the matter charged to be libellous were contained in a letter, sent by the defendant to the prosecutor, and the defence were, that the charges it contained were not with the intent to provoke or exasperate, but were written for the purpose of honest remonstrance and admonition, it would be for the jury to decide, under all the circumstances, considering the situation of the parties, the conduct of the defendant, and the language used, whether the act in reality originated in a sincere and honest intention, or in an evil and sinister motive which warranted a conviction.

[*331] *Again, where there is no evidence of such facts and circumstances as would, if found by the jury, raise either an *absolute* justification, independently of the question of intention, or a *qualified* justification or excuse, dependent on actual intention, then if the question of malice is to be regarded as a question of fact for the jury, it is undoubtedly one which they ought, in that predicament, to draw from the commission of a noxious act. It is a plain and obvious principle, in morals as well as law, that every one must be taken to contemplate and intend the natural and immediate consequences of the act which he does, and the means which he uses. The question of malice may, it seems, in every such case, be more properly regarded as a mere legal inference, arising from the doing of an unlawful act, without legal excuse, than as a question of fact ; malice, in such case, meaning nothing more than the entire absence of legal excuse. Be this as it may, in this case, as well as others, it is clear, for the reasons already adverted to, that in order to warrant a legal judgment of condemnation, the jury must, by their ver-

dict, find that the act was done maliciously or wrongfully, or in such other manner as is sufficient to negative the question of any legal justification or excuse; till then, the presumption of innocence is not excluded, still less is the criminality of the act established.

*The common law doctrine, as to trials for libel, on these points seems to remain still the same notwithstanding [*332] the statute 32 G. III. c. 60, by which such trials on informations and indictments are regulated; the effect of this statute seems to be simply to remove some doubts which had existed, and some peculiarities which had prevailed in practice with respect to trials for libel, and restore the ordinary course and order of the common law.

The practice which, after much legal discussion, at last occasioned the passing of the Libel Bill, was this,—the court, on criminal trials for libel, and where there were no facts or circumstances which raised any justification or excuse in point of law, directed the jury to find the defendant guilty, if they were satisfied as to the fact of publication and the truth of the innuendos. To this it was objected, that in the case of libel, as well as in all others, it was for the court to pronounce an opinion on the legal quality of the act, for the guidance of the jury, and that the *fact of criminal intention* was peculiarly for the jury, who were to give their verdict on the whole of the case. A minute attention to the history of this question, would probably show that, if the jury in such cases did not violate their duty, in taking on themselves to decide matters of law, this apparent deviation from the ordinary practice was wholly immaterial, *as to the final result; that, on the one hand, [*333] the course adopted by the courts was occasioned by their anxiety to prevent juries from exceeding their authority, in cases where strong prejudices were likely to operate; and that, on the other hand defendants probably expected to derive benefit from the operation of such causes, where it was possible that juries might be willing to warp the law according to their feelings and prejudices, and shelter themselves under a general verdict. In ordinary practice, it is, no doubt, for the court to direct the jury, as to the criminal quality of the acts which the evidence tends to prove. Upon a charge of forgery, where evidence is given that the prisoner altered

a genuine instrument, the court informs the jury whether that alteration amounts, under the circumstances, if the facts be proved, to the offence of forgery : in larceny, whether the particular act of which evidence is given, amounts to an asportation sufficient to warrant a charge of felony ; and this is obviously necessary in all cases where the charge is stated, by the aid of any general terms, on the face of the record, and the question arises, whether the particular facts proved are sufficient, in point of law, to support that charge ; in all such cases, the jury would not be warranted in pronouncing a general verdict of guilty, except upon information, in point of

[*334] law, that the facts were sufficient in point of law, to satisfy the allegation on the record ; and it is no doubt the duty of the court to supply this information. The case of libel is peculiar, for there the libel itself is set out on the record, and though the court, at the trial, should not give an opinion on the criminal quality of libel, yet if the matter published were not in law a libel, no penal judgment could afterwards be pronounced. Assuming, therefore, that the alleged libel was, in point of law, no libel, the only difference would be, that, according to the ordinary practice, the defendant would be entitled to his acquittal upon the trial by the jury, whilst according to the former practice, in case of libel, the defendant might be convicted at the trial, but would be entitled to arrest of judgment, by reason of the defect on the record.

With respect to the latter objection, viz : that the question of *intention* ought to be left to the jury, as a question of fact, it is to be observed, that the practice of advising the jury to find the defendant guilty, on proof of the fact of publication and of the proof of the innuendos, was confined to those cases where no legal justification or excuse, either of an absolute or qualified nature as dependent on actual malice, arose out of the circumstances ; and, consequently, where the only question was, whether malice was not a mere legal inference from the very act of publishing illegal matter ; in such cases, therefore, that *is, where the matter published was

[*335] libellous, and there was a total absence of any legal justification or excuse, there was no real question of intention to be left to the jury.

Having made these remarks, for the purpose of showing to what

extent the practice which occasioned the Libel Bill differed from the ordinary course, and that the deviation, though anomalous and unnecessary, and to that extent at least objectionable, was more apparent than real, it will be proper to advert to the different cases which have occurred in relation to this question.

After the abolition of the Star Chamber, which in cases of libel exercised an unbounded control over both law and fact, the cognizance of such offences reverted to the court of King's Bench, to be exercised in the constitutional mode by the intervention of a jury; and till some time after this period, no doubt seems to have been entertained of the right of a jury to give a general verdict in the case of libel, as well as in any other criminal proceeding.

In the year 1670 (*a*), two Quakers, Penn and Mead, indicted for seditiously preaching to a multitude tumultuously assembled in Gracechurch Street, were tried before the Recorder of London, who told the jury, that they had nothing to do but to find whether the defendants had preached *or not; for that, whether the matter or intention of their preaching was seditious, [*336] were questions of law but not of fact, which they were to keep to at their peril. The jury first found Penn guilty of speaking to the people in Gracechurch Street. This verdict having been refused by the Recorder, the jury again retired, and afterwards brought in a general verdict of acquittal; this the court considered as a contempt, and set a fine of forty marks on each of them, and directed them to be confined till the fine should be paid. Edward Bushel, one of the jurors, refused to pay the fine, and being imprisoned in consequence of his refusal, sued out his writ of habeas corpus, which was returned, together with the cause of his commitment, "his acquittal of Penn and Mead against the law of England, against the evidence, and against the direction of the court on matter of law."

Lord Chief Justice Vaughan, on the latter part of the return, observed, "The words that the jury did acquit, against the direction of the court in matter of law, literally taken and *de plano*, are insignificant and unintelligible; for no issue can be joined of matter in

(*a*) Bushel's case, Vaughan Rep. 135.

law; no jury can be charged with matter in law barely; no evidence ever was or can be given to a jury of what is law or not; nor no such oath can be given to or taken by a jury to try matter in law; nor no attaint can lie for such a false oath.

“Therefore we must take off this veil and colour of words, which make a show of being something, and in truth are nothing. [*337]

“If the meaning of these words, finding against the direction of the court in matter of law, be, that the judge having heard the evidence given in court, for he knows no other, shall tell the jury upon this evidence, the law is for the plaintiff or for the defendant, and you are under the pain of fine and imprisonment to find the contrary, then the jury ought of duty so to do; every man sees that the jury is but a troublesome delay, great charge, and of no use in determining right and wrong; and, therefore, the trials by them may better be abolished than continued, which were a strange new found conclusion, after a trial so celebrated for many hundreds of years.

“For if the judge, from the evidence, shall by his own judgment first resolve upon any trial what the fact is, so knowing the fact shall then resolve what the law is, and order the jury severally to find accordingly, what either necessary or convenient use can be fancied of juries, or to continue trials by them at all (*b*).”

[*338] Upon the trial of Nathaniel Thomson (*c*) and *others for composing and publishing libellous remarks upon the administration of justice, the chief justice (*d*) concluded his observations to the jury, by saying—“Gentlemen, I do leave it to you, whether upon this evidence you do not believe them all to be guilty of this design of traducing the justice of the nation.”

In the case of the Seven (*e*) Bishops, who were indicted for having offered a petition to the King, which was alleged to be a libel, the judges, who seemed no ways inclined to favour the defendants,

(*b*) Bushell's case, Vaughan Rep 135.

(*c*) 3 St. Tr. 37. The object of the publication was to prove that Green, Berry, and Hill, had been improperly convicted of the murder of Sir Edmund Godfrey.

(*d*) Sir Francis Pemberton.

(*e*) St. Tr. 4 J. 2.

would not accede to the doctrine of the counsel for the crown, who contended that the malice and sedition, wherewith the prelates were charged, arose by construction of law out of the fact, and that the jury had nothing to concern themselves with but the fact of the publication in Middlesex.

The defendants had given in evidence several parliamentary documents, to prove that the dispensing power claimed by the king, and against the exercise of which the petition of the Bishops was directed, was illegal. The then Attorney-General, after some slight remarks upon this evidence, was about to conclude with a somewhat flippant expression of regret, that the *defendants' [*339] counsel had spent their time to so little purpose, when the chief justice observed, " Yes, Mr Attorney, I'll tell you what they offer, which it will lie on you to give an answer to,—they would have you show how this has disturbed the government or diminished the King's authority." The Attorney General then contended, that malice or sedition arises by construction of law out of the fact ; and that if the thing be illegal, the law says it is seditious, and a man shall not come and say he meant no harm by it.

And afterwards, whilst the Solicitor General was speaking, the chief justice interrupted him by requesting him to come to the business before them, and to show that the alleged libel was in diminution of the King's prerogative, or that he ever had such a prerogative.

Upon summing up to the jury, the chief justice, after addressing the jury upon the point of publication, proceeded, " If you believe this was the petition they presented to the King, then we must inquire whether this be a libel." The chief justice then proceeded to intimate his opinion, that the publication in question was a libel, but as it was a point of *law*, invited his brethren to give their opinions.

This the other judges proceeded to do.

Justice Holloway concluded by saying, " I *cannot [*340] think it is a libel ; it is left to you, gentlemen, but that is my opinion."

Powell, J. also delivered his opinion to the same effect, leaving the issue to the conscience of the jury.

And afterwards, when the jury retired to determine upon their verdict, they were permitted to take with them the alleged libel.

Upon the trial of John Tutchin (*f*), upon an information for publishing a libel entitled the *Observer*, Lord Holt, C. J. after reading the printed papers alleged to be libels, told the jury, "Now you are to consider, whether these words I have read to you do not tend to beget an ill opinion of the administration of the government." The learned judge, it is true, concluded his address as was afterwards observed by Lord Mansfield, C. J., by saying, "If you are satisfied that he is guilty of composing and publishing these papers in London, you are to find him guilty." But these words have immediate reference to the ground of defence upon which Mr. Tutchin's counsel meant to reply: namely, that the offence had not been proved to have been committed in London, and cannot

[*341] be considered as used for the purpose of *withdrawing the attention of the jury from the quality of the publication, upon which they had just before received instructions; and indeed to suppose it had so meant would prove too much, since if so, the jury were directed not to find the truth of the innuendos.

The first instance that appears where the court directed the jury to find the defendant guilty, if they were satisfied with the evidence of publication, appears to be that of the *King v. Clerk (g)*, for publishing Mist's Weekly Journal. It appeared, upon evidence, that the defendant acted merely as servant to a printer; that his business was to clap down the press, and there was little or no proof of a guilty knowledge of the contents of the paper, or of his being concerned in a criminal act. It was objected by Serjeant Hawkins, that the course of a malicious and traitorous design was not supported by the evidence from which it appeared that the defendant acted ignorantly and in obedience to his master's directions. But it was answered, that since the defendant was merely charged with the publishing a seditious libel, the malice was immaterial; and Lord Raymond, C. J. informed the jury, that the fact of printing and publishing only was in issue.

[*342] And the same learned judge, upon the trial of *an in-

(*f*) 4 St. Tr. 659.

(*g*) 2 G. II. 1729. Barnard K. B. 304.

formation (*h*), directed the jury, "that there were three points for consideration: the fact of publication, the meaning, (these two for the jury,) the question of law or criminality for the court upon the record."

Lord Chief Justice Lee gave the same direction in the *King v. Owen* (*i*) and Lord Chief Justice Ryder followed his example in the case of the *King v. Nutt* (*k*).

Lord Mansfield, soon after his appointment to the high office of chief justice, laid down (*l*) the same doctrine in the case of the *King v. Shebbeare*; and though the same learned judge repeated the same directions in a number of similar cases, all disquisition upon the province of the jury on these points seems to have slept, till the verdict given in the case of the *King v. Woodfall* (*m*). That was the case of an information filed by the Attorney-General for publishing a seditious libel signed *Junius*; the jury found him guilty of the printing and publishing ONLY.

Upon motion to arrest the judgment, it was insisted upon for the defendant, that a criminal *intention is the [*343] essence of the offence; and that since they had not found malice, it must be taken not to have existed, since a verdict could not be supplied by inference; but that at all events, the verdict was imperfect, and that there should be a new trial. For the crown it was argued, that the law would collect the intention from the libel itself; that the printing and publishing were all the jury had to inquire about, and that the intention might be collected from the libel itself.

Lord Mansfield, C. J. in delivering the judgment of the court, observed, "there may be cases where the fact proved as a publication may be justified, or excused as lawful or innocent; for no fact which is not criminal, in case the paper be a libel, can amount to a publication, of which the defendant ought to be found guilty. But no question of that kind arose in this case, therefore I directed the jury to consider whether all the innuendoes, and all the applica-

(*h*) 9 St. Tr. 255.

(*i*) 10 St. Tr. App. 169. 25 G. II. K. B. MSS. Dig. L. L. 67.

(*k*) Per Lord Mansfield, 3 T. R. 430, in the notes.

(*l*) Ib.

(*m*) 5 Burr. 2661.

tions to matters and persons, made by the information, were in their judgments the true meaning of the paper; if they thought otherwise, they should acquit the defendant, but if they agreed with the information, and believed the evidence as to the publication, they should find him guilty." The learned judge then proceeded to observe, that if proof of the express intent of the defendant were requisite, the direction was wrong; but that, whether [*344] "the paper was in law a libel, was a question of law upon the face of the record; and that the epithets in the information were formal inferences of law from the printing and publishing. That the verdict finds only what the law infers from the fact; that where an act, in itself indifferent, if done with a particular intent, becomes criminal, there the intent must be proved and found; but where the act is in itself unlawful, the proof of justification lies upon the defendant, and in failure thereof, the law implies a criminal intent."

Having thus declared his opinion upon the subject of libel, in the propriety of which his brethren agreed with him, Lord Mansfield then proceeded to deliver the sense of the court upon the verdict before them; the substance of which was, that as a doubt had arisen from the introduction of the ambiguous and unusual word *only* into the verdict, there should be a *venire de novo* (n).

The legality of the doctrines laid down by Lord Mansfield in *Woodfall's* case, appears to have been expressly decided upon by the Court of King's Bench, for the first time, in the case [*345] of the *King* against (o) *Wm. Davies Shipley*, Dean *of St. Asaph. The defendant was tried before Mr. J. Buller, at Shrewsbury (p), upon an indictment, charging him with having published a malicious, seditious, and scandalous libel, entitled "The Principles of Government, in a Dialogue between a Gentleman and a farmer," with intent to incite the King's subjects to attempt, by force and violence, to make alterations in the government, state, and constitution of the kingdom. The fact of publication was clearly proved; and of the truth of the imputations there was no

(n) *Woodfall's* case, 5 Burr. 2661.

(o) 3 T. R. 428, in the notes. See also *Ridgway's Speeches* of the Hon. Thomas Erskine, vol. I.

(p) Aug. 6th, 1784.

doubt, since they merely averred, that by the letter G., was meant gentleman; by F., farmer; by the King, the King of Great Britain. One witness for the defendant stated, that upon his informing him, that some gentlemen were of opinion the publication might do harm, the defendant answered, he should be sorry to publish any thing that tended to sedition; that some time after, he said upon reading it at a public meeting, "I am now called upon to show that it is not seditious, but I read it with a rope about my neck;" and that upon another occasion (*q*) when he had read it, he gave his opinion *that it was not so bad*.

The learned judge, on summing up to the jury, *de- [*346]
clared, that it was not for him to say whether the pamphlet was or was not a libel; and concluded his address to them in these words:—"If you are satisfied that the defendant did publish this pamphlet, and are satisfied as to the truth of the innuendoes, in point of law, you ought to find him guilty; if you think they are not true, you will acquit him." The jury brought in their verdict "guilty of publishing ONLY." The learned judge then informed them, that by such a verdict they would negative the meaning of the innuendoes, but that if they left out the word *only*, the question of law would be open upon the record, and that the defendant might move in arrest of judgment. Upon this direction, Mr. Erskine (the defendant's counsel) said, "I beg to ask your lordship this question, whether, if the jury find him guilty of publishing, leaving out the word *only*, and if the judgment be not arrested by the court of King's Bench, the sedition will not stand recorded?"

Mr. J. Buller. "No, it will not; unless the pamphlet be a libel in point of law." The jury then returned their verdict, "Guilty of publishing, but whether a libel or not we do not find."

Upon a motion for a new trial, on the ground of a misdirection by Mr. Justice Buller, the counsel for the defendant urged the following points—

*1. That in every criminal case, upon a plea of not [*347]
guilty, the jury are charged generally with the defendant's deliverance from that crime, and not specially from any single fact. Upon this topic it was urged, that the rules of pleading in

(*q*) Ridgway's Speeches of the Hon. Thomas Erskine.

civil cases were framed for the purpose of preserving the jurisdiction of the court and jury distinct, by a separation of the law from the fact; but that in criminal cases, no such boundary was ever attempted;—that, on the contrary, it had been the custom, from the time of the Norman conquest, for the defendant to throw himself upon his country for deliverance, upon the general issue of not guilty, and to receive from the verdict of the jury a complete, general and conclusive deliverance.

In support of this doctrine, the opinions of Sir Wm. Blackstone, Sir M. Hale, Sir Mich. Foster (*r*), and Lord Raymond, were (*s*) referred to, and thence assuming that the jury had a right to give a general verdict, it was contended, that to enable them to do so, it was the duty of the judge to direct them upon the law; and that having omitted so to direct them, and having informed the jury, that
 [*348] neither the illegality of the paper, nor the intention of the defendant, were within *their jurisdiction, the defendant had, in fact, been found guilty without any investigation of his guilt, and without any power left to the jury to take cognizance of his innocence.

That 2^{lly}. No act is in itself a crime, as abstracted from the malicious intention of the actor, the establishment of the fact being nothing more than evidence of the crime, and not the crime itself, unless the jury render it so by referring it voluntarily to the court by special verdict. That in every case, a general verdict, which is as comprehensive as the issue, unavoidably involves a question of law as well as fact, and therefore that a judge who means to direct a jury to find generally against a defendant, must leave to their consideration every thing which goes to the constitution of that general verdict, and to direct them how to form that general conclusion of guilty, which is compounded of both law and fact.

That the verdict must be taken to be either general or special; if general, it had been found without a co-extensive examination— if special, the term guilty could have no place in it: that the term guilty was either operative and essential, or a mere epithet of form; if essential, then a conclusion of criminal intention had been ob-

tained from the jury without permitting them to exercise their judgment on the defendant's *evidence—if formal, [*349] no judgment could be founded on it.

3dly. That the circumstance of the libel's appearing upon the record did not distinguish it from other criminal cases. For first, the whole charge does not always appear upon record ; since a part of a publication may be indicted, and may, when separated from the context, bear a criminal construction ; and since the court is circumscribed by what appears upon the record, the defendant could neither demur to the indictment nor arrest the judgment after a verdict of guilty. That the defendant is equally shut out (by the doctrine insisted on) from deriving any aid from context, in his defence before a jury, for though he should read the explanatory context in evidence, he can derive no advantage from reading it, if the jury are bound to find him guilty of publishing the matter contained in the indictment, however its innocence may be established by a view of the whole work ; that the only operation of the context is to show the matter upon record not to be libellous, from the consideration of which, as being matter of law for the consideration of the court, they are excluded : that to allow the jury to go into the context, in order to form a correct judgment of the part indicted, is a palpable admission of their right to judge the merits of the paper and the *intention of its author ; [*350] and that it would be preposterous to say that the jury have a right to decide a paper criminal as far as appears upon the record, to be legal, when explained by the whole work, of which it is a part ; but that they have no right to say, that the whole work, if it happen to be set out on the record, is innocent and legal.

That it is equally absurd to contend that the intention of the publisher may be shown as a fact by the evidence of any extrinsic circumstances—such as the context ; and in the same breath to say that it is an inference of law from the act of publication which the jury cannot exclude. That the consequences of such a doctrine would be most dangerous, since, if a seditious intention could be inferred from publishing any paper, charged to be a libel, a treasonable intention might with equal reason be inferred from publishing a paper charged to be an overt act of treason.

4thly. That a seditious libel contains no matter of law ; for the court, in considering the question of a libel, as it appears upon the record, are circumscribed in forming their judgment, and can derive no assistance from extrinsic circumstances ; since, if they were to break through their legal fetters, their judgment would be founded in facts, not in evidence ; but that such objections [*351] would vanish if the seditious tendency be considered as a question of fact, since the jury can examine, by evidence, all those circumstances, which establish the seditious tendency of the paper, from which the court are shut out.

5thly. That in all cases when the mischievous intention, which is the essence of the crime, cannot be collected by simple inference from the fact charged, because the defendant goes into evidence to rebut such inference, the intention becomes a pure unmixed question of fact for the consideration of the jury. That “ the publication (t) of that which is unlawful is but evidence of a criminal intent ;” but that, in the principal case, evidence had been offered in favour of the defendant, though, by the learned judge’s directions to the jury, the whole of it had been removed from their consideration. That in *Lamb’s* (u) case it was laid down, that every one who should be convicted of a libel must be the writer, contriver, or malicious publisher, knowing it to be a libel ; that the knowledge there meant was not a mere knowledge of the contents, for that would make criminality depend upon the consciousness of an act, and not on the knowledge [*252] of its quality, which would involve lunatics and children in all the penalties of criminal law.

Lord Mansfield, C. J. in delivering the judgment of the court, observed, “ Four objections have been made ; the first is peculiar to this case, namely, that evidence of a lawful excuse or justification was not left to the jury as a ground of acquittal. Upon every such defence, there arise two questions—the one of law, the other of fact. Whether the fact alleged (supposing it true) be a lawful excuse, is a question of law ; whether the allegation be true, is a question of fact ; and according to this distinction, the judge ought

(t) Lord Mansfield’s doctrine in the cases of *Woodfall* and *Almon*, 5 Burr. 2661. 2686.
(u) 9 Co. 59.

to direct and the jury ought to follow his direction; though by means of a general verdict they are entrusted with the power of confounding the law and fact, and of following the prejudices of their affections and passions."

The learned judge then proceeded to comment upon the evidence offered by the defendant, which the court considered as rather aggravating his conduct than supplying a ground of defence to be left to the jury. His lordship then observed, "The second objection is, that the judge did not give his own opinion whether the writing was a libel, or seditious or criminal. The third, that the judge told the jury that they ought to leave the question upon the record to the court, if they had no doubt of the *meaning [*353] and publication." That the answer to these objections is, that, by the constitution, the jury ought not to decide the question of law, whether such a writing of such a meaning, published without a lawful excuse, be criminal, and that they cannot decide it *against the defendant*, because, after a verdict, it remains open upon the record. That this is peculiar to the form of a prosecution for libel, that the question of law remains open for the court on the record, and that the jury cannot decide it against the defendant; so that a general verdict that the defendant is guilty is equivalent to a special verdict in other cases.

That no case had been cited of a special verdict in a prosecution for libel, leaving the question of law upon record to the court. That a criminal intent, from doing a thing in itself criminal without a lawful excuse, is an inference of law. That the practice objected to had continued ever since the revolution without opposition. That the fundamental definition of trials by jury, depends upon an universal maxim without an exception, *Ad questionem facti respondent juratores, ad quæstionem juris respondent iudices*; that where the questions can, by the form of pleading be separated, the distinction is preserved upon the face of the record; but that when by the form of pleading the two questions are blended together, and cannot be separated *upon the face of the record, [*354] the distinction is preserved by the honesty of the jury.

His lordship concluded by giving the judgment of the court, that the rule for a new trial should be discharged (x).

Lord Kenyon, C. J. adopted Lord Mansfield's doctrine in summing up to the jury in the case of the *King v. Withers* (y).

After this brief review of the principal decisions upon this interesting topic, little remains, but to quote the terms used by the legislature, when parliament deemed it proper to interfere and remove all doubt from this important subject.

In the statute 32 George III. c. 60, it is recited that doubts had arisen, whether on the trial of an indictment or information for the making or publishing any libel, when an issue or issues are joined between the King and the defendant or defendants, on the plea of not guilty pleaded, it be competent to the jury impannelled to try the same to give their verdict upon the whole matter in issue; and it is then *declared and enacted* that on every such trial [*355] the jury *sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information, and shall not be required or directed by the court or judge, before whom such indictment or information shall be tried, to find the defendants guilty, merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information. By the second section it is provided "that on every such trial the court or judge, before whom such indictment or information shall be tried, shall, according to their or his discretion, give their or his opinion and direction to the jury on the matter in issue between the King and the defendant or defendants, in like manner as in other criminal cases." By the third section it is also provided, "that nothing herein contained shall extend, or be construed to extend, to prevent the jury from finding a special verdict, in their discretion, as in other criminal cases." And by the fourth section, "in case the jury shall find the defendant or defendants guilty, it shall and may be lawful for the said defendant or

(x) Mr. Erskine afterwards moved in arrest of judgment, and judgment was arrested, the court considering the indictment to be defective.

(y) 3 T. R. 428.

defendants to move in arrest of judgment, on such ground and in such manner as by law he or they might have done before the passing of this act, any *thing herein contained [*356] to the contrary notwithstanding." [1]

It is observable, that the first clause in this statute is, so far as regards the giving a general verdict, merely *declaratory*, placing informations and indictments for libels on the same footing with those for any other offences. The latter branch is, in its terms, purely negative and restrictive, and, except that it amounts to a legislative disapproval of the directions which had been given to juries in particular instances, is rendered unimportant by the subsequent clause, which directs, affirmatively, what the court or judge *shall* do on such trials. This (the second) section provides, that the court or judge shall, according to their or his discretion, give their or his opinion on the matter in issue, in like manner as in other criminal cases. It is, therefore, observable, that the object of the legislature was to remove all anomalies and peculiarities by which trials for libels were distinguished from those for any other offences. Now, the principal peculiarity, and that on which the difference in practice originated, was this: that in the case of libel, the alleged libel was stated on the record, on which account it was unnecessary to decide at the trial upon the quality of the matter published. But, by the express provision of this clause, the jury *are [*357] to be directed *as in other criminal cases*; and in

[1] In 1805 a similar act was passed by the Legislature of the State of New-York, see *Statutes of New-York*, 4th vol. *Webster & Skinner's ed.* ch. 90, p. 232. The act of 1805, however, is broader in its terms than that of 32 Geo. III., as it not only like that act declares the right of the jury to find a *general verdict* and *forbids a direction* to find the defendant guilty, merely on the proof of the publication of the matter charged to be libellous, and of the sense ascribed to it in the indictment, but declares and enacts that on every indictment for a libel, *the jury who shall try the same, shall have a right to determine the law and the fact* under the direction of the court, in like manner as in other criminal cases: which principle was subsequently incorporated in the BILL OF RIGHTS and in the Amended CONSTITUTION of the State. *Const.* Art. 7, § 9, and 1 R. S. 94, § 21. The act of 1805, like that of 32 Geo. III. makes provision for a motion in arrest on the part of the defendant, notwithstanding that the *jurors* are authorized to pass upon the *law* as well as the *facts* of the case. See the history of the passage of the act of 1805, page 252, *supra* note [1].

other criminal cases, the ordinary course is to advise and direct the jury as to the criminal quality of the transaction, supposing the facts to be proved. It seems, therefore, to follow, that the court or judge is bound to give an opinion on the legal quality of the alleged libel, as stated on the record, and the jury are not to convict without the previous sanction of the judge's opinion that the act is criminal, though, in some instances, they had been required to convict, where they were satisfied as to the fact of publication and the truth of the averments. The opinion and direction to the jury is to be given *on the matter in issue*; by these terms it is not, it seems, to be understood that the court or judge is called upon to give any opinion or direction in the affirmative or negative upon the whole of the issue, but only, as in other cases, conditionally and hypothetically upon the law, as it arises on different branches of the evidence. As, whether if the facts be proved to the satisfaction of the jury, which the evidence tends to prove, they amount in law to a publication; whether the circumstances proved raise an absolute or qualified justification; whether, under these circumstances, proof of express malice be essential, or in the absence of any evidence of facts which can justify or excuse, the jury ought to infer

malice *from the very act of publishing noxious and criminal matter. The third section seems to have been introduced merely for the purpose of repelling any inference which might otherwise have arisen from the terms of the first, that the jury were *bound* to give a general verdict. The fourth section seems to have been suggested by some apprehension, that, without an express clause to that effect, the defendant might be considered to be excluded from objecting that the alleged libel, as stated on the record, was not in itself illegal, and that the publishing of it was not criminal. As the second section provides, in effect, that the court or judge shall, at the trial, direct the jury as to the criminal quality of the alleged libel, and the jury were at their option to give a general verdict, it was probably deemed to be expedient to prevent, by an express enactment, all doubt on the question, whether such opinion and verdict were to be considered as final and conclusive. It seems, therefore, that the legislature meant to leave the question, whether the matter published amounted to a libel, as be-

fore, a question of law [1]; the fourth clause expressly provides, that the defendant may still move in arrest of judgment, on such ground as he might have done before; and as, before the statute, the defendant might certainly have arrested the judgment on the ground that the matter published was not libellous, it seems *that no alteration was intended to be made in this respect, but that the objection, that the matter published was innoc- [359] ious, as it stood on the record, was still available. But, whilst this is the case, it is obvious that the question must remain a question of law; a general acquittal would be conclusive, as in all other cases, but the finding of the jury, as to the mere criminal quality of the alleged libel, either by a general verdict of guilty or by a special verdict, must be immaterial, so long as the objection may be taken to the record itself, that it charges no libel in point of law, notwithstanding the finding of the jury in fact (z).

(z) See *R. v. Holt*, 5 T. R. 436. In the case of *R. v. Burdett*, 4 B. and A. 131, Best, J. observes, ‘It must not be supposed that the statute of George the Third made the question of libel a question of fact; if it had, instead of removing an anomaly, it would have created one. Libel is a question of law, and the judge is the judge of the law in libel, as in all other cases; the jury having the power of acting agreeably to his statement of the law or not. All that the statute does, is to prevent the question from being left to the jury in the manner in which it was left before that time. Judges are, in express terms, directed to lay down the law as in other cases. In all cases, the jury *may* find a general verdict; they do so in cases of murder and treason, but then the judge tells them what is the law, though they may find against him, unless they are satisfied with his opinion. And see 4 Bingham 195.

[1] At the time of the publication of the second English edition of this treatise (in 1830), the law on this subject was no doubt held in England as stated in the text, viz: that notwithstanding the act of 32 Geo. III. ch. 60, the question whether the matter published amounted to a libel was *a question of law*. The views of Best, J. as to the effect of that act are briefly stated in the note of the author on the present page, (viz: note z. p. 359) and will be found more in detail in the report of the case of *The King v. Burdett*, 4 Barn. and Ald. 95, 131, decided in 1820. That case was tried before Best, J. who charged the jury that they *must take the law from him as to whether the publication was or was not a libel*, in which direction he was sustained by the whole court, who held that such was the *correct mode of leaving the question to the jury*, under the act of 32 Geo. III. In 1827, Best, then holding the office of Chief Justice of the King’s Bench, repeated in *Levi v. Milne*, 4 Bingham 195, the doctrine advanced

by him in *The King v. Burdett* as to the effect of the act of 32 Geo. III. upon the rights of the jury, and insisted that the act had no applicability to civil cases. In 1810, however, that act received a construction in the case of *Baylis v. Lawrence*, 11 Adolph. and Ellis 920, more in conformity with the intention of the law-makers, according to the history of the act given in the preceding part of this chapter. Previous to that act, the only questions submitted to the *jury* were: 1, as to the publication of the alleged libel; and 2, as to the truth of the innuendoes, leaving the question of *libel* or *no libel* to be determined by the *court*; and to remedy the mischief which had thus crept into the administration of the law, the act was passed. *Baylis v. Lawrence* was an action for libel. The presiding judge submitted the case to the jury *without expressing any opinion* whatever, whether the publication was or was not libellous, or even giving any instructions as to what constituted a libel. Of the course thus taken by the judge complaint was made on the part of the plaintiff, against whom the verdict was found. Lord DENMAN, C. J. held that the judge was not bound to state his opinion to the jury whether the publication was or was not libellous. The act of 32 Geo. III. he said was applicable only to *criminal cases*, but it was a declaratory act, and the importance of declaring the law existed only in the case of criminal libels. The act, therefore, he said furnished clear evidence, that the judge is not in *civil cases* bound to state his opinion. He further observed that he had always followed the practice adopted in this case by the presiding judge, of *leaving it to the jury to say whether under all the circumstances, the publication amounts to a libel*. The other judges acquiesced in the doctrine of the Chief Justice that the law in *criminal cases*, as declared by the act of 32 Geo. III. *is the law in civil cases*; in respect to which a jury has never been required to find a verdict against the defendant upon the mere proof of publication and of the truth of the innuendoes, leaving the question of libel or no libel to the determination of the court. Previous to the decision of *Baylis v. Lawrence*, Lord Chief Justice ABBOTT, in the case of *Fairman v. Ives*, 5 Barn. and Ald. 642, submitted to the jury the facts and circumstances attending a publication alleged to be libellous, and left it to them to declare whether it *was or was not libellous*; and the jury having found for the defendant, the court unanimously refused to grant a new trial. The same course was pursued in *Haire v. Wilson*, 9 Barn. and Cres. 472, decided 1829; and in *Fisher v. Clement*, 10 Barn. and Cres. 472, decided in 1830. See also all the cases cited in *this work* in chapter XIII. of the 1st. vol. of Starkie on slander. Am. ed. 1813. on the subject of *privileged communications*—in all of which invariably the question of whether the publication was or was not libellous, was submitted to the jury.

CHAPTER XVII.

OF THE PROCEEDINGS AFTER THE TRIAL.

*THE court will not, after the defendant's conviction, [*360] make an order on the prosecutor to deposit the original libel with the officer of the court (*a*). After the defendant has been found guilty on a criminal information, it is a matter of course that he should stand committed, pending the consideration of the judgment, unless the prosecutor expressly consent to his standing out upon bail (*b*).

The defendant cannot (*c*) move for a new trial after the first four days of the next term after conviction; but if it appear to the court that injustice has been done by the verdict, they will, *ex mero motu*, interfere after that period and grant a new trial.

The vice of one or more counts is no ground for arresting the judgment (*d*), provided there be one valid [*361] count in the information or indictment, though, as already seen, it is otherwise in a civil action, where general damages are given, since in the latter case the court cannot apportion the damages, and say how much was intended to be given in respect of the defective counts.

When the defendant is brought up for judgment, affidavits are produced either by the prosecutor or the defendant; and observations concerning them relate either to their contents or to the order in which they are read.

(*a*) 2 East. 361. R. v. Cator.

(*b*) R. v. Wadington, 1 East. 143.

(*c*) 5 T. R. 436. 1 East. 145.

(*d*) R. v. Benfield and Sanders, Burr. 980.

Where a defendant has been convicted, the prosecutor may read affidavits in aggravation, though made by witnesses who were examined at the trial; in which case the defendant will (e) be at liberty to answer them.

And, where a defendant had (f) suffered judgment by default, the prosecutor was allowed to read affidavits in aggravation, containing expressions made use of by the defendant, confirming and aggravating his guilt, which had been uttered by him in the hearing of two persons, and by them afterwards related to the persons making the affidavits, the prosecutor having first made [*362] *affidavit that an application had been made to both those persons to come forward with their testimony, which they had refused, and it appearing to the court that they were under control. But the court allowed the defendant and those persons time to come forward and answer the facts. And such evidence would be inadmissible, unless it appeared that the person refusing to give evidence was (g) under the control of the defendant.

To show the malice of the defendant, it is usual for the prosecutor to state upon his affidavit similar libels published since the conviction (h).

After judgment by default in a criminal prosecution, when the defendant is brought up for judgment, each party should come prepared with affidavits, stating his case; and if, in the course of the inquiry, the court wish to have any point further explained, they will give the defendant an opportunity of answering it on a future day (i).

[*363] *The defendant is, in general, at liberty to introduce

(e) *R. v. Sharpness*, 1 T. R. 228.

(f) *R. v. Archer*, 2 T. R. 204.

(g) *R. v. Pinkerton*, 2 East. 357.

(h) See *R. v. Withers*, 3 T. R. 432. Where Lord Kenyon, Chief Justice, said, "It is well settled that the conduct of the defendant, subsequent to his conviction, may be taken into consideration either by way of aggravating or mitigating the punishment: but the court will take care not to inflict a greater punishment than the principal offence will warrant." The same was ruled in the case of *R. v. Walter*.

(i) *R. v. Wilson*, 4 T. R. 487.

any affidavit tending to show that his act did not result from pure malice, but proceeded from some motive less reprehensible ; how far he should proceed in his statement is, of course, a matter of prudence and discretion to be exercised upon the particular circumstances of the case.

Any reflections upon the prosecutor beyond those conveyed by a bare statement of facts, and any attempt to impugn the credit of the witnesses, or the justice of the conviction, are inconsistent with the situation of the defendant, who stands before the court as a suppliant for its indulgence, and not in the character of an accuser.

It seems to be settled that a defendant is not at liberty to show, by affidavit, that a libel, imputing a criminal charge, was true, whether the party reflected on be or be not the prosecutor (*j*) [*a a*].

*In the case of the *King v. Burdett*(*k*), where the libel imported that certain of the King's troops had maimed [*364] certain of the King's subjects, it was held that it was not competent to the defendant to use affidavits, after conviction, in mitigation of punishment, for the purpose of showing that the facts stated were true. But the libel purporting to have been written in consequence of the defendant's having read statements to that effect in different newspapers, an affidavit that he had read those state-

(*j*) *R. v. Halpin*, 9 B. and C. 65. In the case of the *King v. Roberts*, Mich. T. 8 G. I. supra v. II, p. 232, Dig. L. L. 16. Selwyn's *Nisi Prius* 1045, 7th edit. Holt's L. L. 273. Lord Hardwicke is reported to have intimated, that the truth of a libel might be shown in mitigation of punishment. It is, however, to be observed that, in the same case, the same learned judge is reported to have stated, that truth would be no justification in an action for a libel. The latter position is certainly incorrect, according to later authorities, although the point was formerly doubted. Supra v. I, p. 232, 3.

In the case of the *King v. Draper*, (cited by Best, J. in the case of the *King v. Burdett*, 4 B. and A. 321,) the court received affidavits of the truth of the charge ; but that was done by the consent of the prosecutor. For other observations on this subject, see the Preliminary Discourse.

[*a a*] In the case of *The King v. Bradley*, 2 M. & R. 152, the court of K. B. is stated to have observed, on a defendant being brought up to receive judgment for a libel, after conviction upon the trial of an information, that he could not then urge the truth of the charge after having been put to fair proof of it upon the trial—*quere* ?

(*k*) 4 B. and A. 314.

ments in the newspapers, and that he had no doubt, in his own mind, that the statement was true, were allowed to be read.

In the above case, the parties to whom the criminal charge was imputed by the libel, were not the prosecutors, and some stress was laid on that circumstance by the court, in giving their judgment. In the late case of the *King v. Halpin* (1), such affidavits were excluded, although the party libelled was himself the prosecutor. [*365] But it was then also held, that though the defendant was not at liberty to show by affidavit that the charge was true, yet that he might disclose such circumstances as might induce the court to believe that he supposed it to be true when he published the libel (m).

General evidence of good character, is always proper to be introduced into affidavits in mitigation.

It is not usual to give the defendant an opportunity of answering at a future day the affidavits produced by the prosecutor, where they do not extend beyond the allegations contained in [*366] the indictment, though judgment should have been suffered by default (n). But where affidavits are produced to show a continuation of the defendant's malice, the court has thought it reasonable to allow the defendant an opportunity of answering them, since it cannot be supposed that he comes prepared to answer (o) that which is not contained in the indictment.

(1) 9 B. & C. 65.

(m) But in the case of the *King v. Baker*, Bull. N. P. 9, which was an information against the defendant for publishing a libel against Mr. Swinton, of Wadham college, Oxon, charging him with criminal practices, Lee, C. J. refused to let the defendant give evidence of his reasons for doing it, viz. that the supposed criminal accomplice told him so; for, he said, the only question was, whether the defendant was guilty of printing or publishing the libel, and that, though it were offered by way of mitigation only, yet, in fact, it amounts to a justification; and it has always been holden, that the matter of a libel cannot be given in evidence by way of justification, because, if the person charged with any crime be guilty, he ought to be proceeded against in a legal way, and not reflected on in this manner. And afterwards, (Tr. 13 and 14 G. II) the Court of King's Bench would not permit an affidavit of this matter to be read in mitigation of the fine, as they would not, on the report, receive any evidence of matter which did not appear at the trial.

(n) *R. v. Wilson*, 4 T. R. 487.

(o) *Ib.* and *R. v. Archer*, 2 T. R. 263.

With respect to the order observed in reading affidavits:

When a defendant is brought up to receive judgment after conviction for a libel, his affidavits (*p*) are first read, and then the prosecutor's; after which, the defendant's counsel are first heard, and then the prosecutor's.

When the defendant is brought up on judgment by default, the prosecutor's affidavits are first read, and then the defendant's; after which the counsel for the prosecution are heard, and then the counsel for (*q*) the defendant.

Where there are no affidavits, the defendant's counsel always begin; where judgment is by default, and there are affidavits for the defendant, *but none for the prosecution, the [*367] defendant's counsel begin (*r*).

Of the punishment.

No offence seems to have been visited with punishment so varied in species and degree, as that which is the subject of the foregoing treatise; a striking proof how difficult it is to estimate its evil consequences, and of the different conceptions which, in different communities, have been entertained of their magnitude.

The history of foreign countries exhibits the penalties for this crime in every gradation, from the infliction (*s*) of death to the bleeding of the offending (*t*) organ; even in this it has been punished with very different degrees of severity, and the history of the Star Chamber records sentences upon libellers whose rigour can scarcely be exceeded: thus Wrennum, for traducing and scandalizing the Lord Chancellor Bacon, in a book delivered to the king, was sentenced by that *court to be *perpetually* im. [*368] prisoned, to pay a fine of £1000, to be twice pilloried,

(*p*) R. Mich. 29 G. III. Tidd's Pr. 454, 4th edit. and R. v. Bunts, 2 T. R. 683.

(*q*) R. Mich. 29 G. III. Tidd's Pr. 454. 2 T. R. 683.

(*r*) R. v. Finnerty, Hil. T. 1811.

(*s*) Although the author of the *Libellus Famosus* was punishable capitally, qu. whether the offence was generally so punishable by the law of the Twelve Tables. See Prel. dis.

(*t*) According to Sir E. Coke, the Lydians bled the slanderer in the tongue, and the listener in the ear, 12 R. 35. By the laws of Alfred, the "*Publicum mendacium*" was to be punished by the cutting out of the tongue, subject to redemption, *juxta capitis æstimationem*. Wilk. Leg. Ad. Sax. 41.

and to lose both his ears. Leighton, for his publication, intituled "An appeal to Parliament, or Sion's Plea against Prelacy," was sentenced to pay a fine of £10,000, to be whipt at the pillory twice, to lose both his ears, to have his nose slit and face branded, and to be imprisoned in the Fleet *during life* (u).

One of the earliest instances in which a libeller was sentenced to the pillory at common law, appears to have been that of Hugh Baker, who, in the fourth year of Elizabeth, was, for publishing a libel upon some of the inhabitants of Chertsey, sentenced to imprisonment, pillory, and to find security for his good (x) behaviour. Since that period, this mode of punishment at common law has not been unusual, but has seldom been inflicted in modern times, except in cases marked by some peculiar atrocity, and has generally been reserved for the more signal disgrace of those who have been convicted of disseminating profane or obscene libels. And now by the

provisions of the late statute 56 G. III. c. 138, this
[*369] mode of punishment, in the case of libel, is 'wholly excluded. As a misdemeanor, at common law, the offence

is of course punishable by fine and imprisonment, at the discretion of the court, after a full consideration of all the circumstances, tending either to extenuate or aggravate the guilt of the offender. In addition to this, it is frequently deemed proper to impose upon the defendant the condition of finding security for his good behaviour, for a limited term, by which expedient the court are enabled to extend an humane indulgence to the offender, in respect of the duration of his imprisonment, without compromising their first and great duty to the public, the providing for its future security.

By the st. 60 G. III. and 1 G. IV. c. 8, intituled An Act for the more effectual prevention of Blasphemous and Seditious Libels, provision is made for enabling the judge or court, after verdict or judgment by default, to order all copies of such libel in the possession of the defendant to be seized (y). By sec. 2.

(u) 6 C. 1. 1631. See also the cases of Prynne, Burton, Bustwick, &c.

(x) 3 Ins. £20.

(y) "Whereas it is expedient to make more effectual provision for the punishment of blasphemous and seditious libels, be it enacted that, from and after the passing of this act, in every case in which any verdict or judgment by de-

such (z) copies are *to be restored, in case the judgment be [*370] arrested or reversed. The fourth section (a) subjects a defendant, in respect of a second conviction to such punishment as

fault shall be had against any person for composing, printing, or publishing any blasphemous libel, or any seditious libel tending to bring into hatred or contempt the person of his Majesty, his heirs, or successors, or the Regent, or the government and constitution of the United Kingdom as by law established, or either House of Parliament, or to excite his Majesty's subjects to attempt the alteration of any matter in church or state as by law established, otherwise than by lawful means; it shall be lawful for the judge or the court, before whom or in which such verdict shall have been given, or the court in which such judgment by default shall be had, to make an order for the seizure and carrying away, and detaining in safe custody, in such manner as shall be directed in such order, all copies of the libel which shall be in the possession of the person against whom such verdict or judgment shall have been had, or in the possession of any other person named in the order for his use; evidence upon oath having been previously given, to the satisfaction of such court or judge, that a copy or copies of the said libel is or are in the possession of such other person for the use of the person against whom such verdict or judgment shall have been had as aforesaid; and, in every such case, it shall be lawful for any justice of the peace, or for any constable or other peace officer, acting under any such order; or for any person or persons acting with or in aid of any such justice of the peace, constable, or other peace officer, to search for any copies of such libel in any house, building, or other place whatsoever, belonging to the person against whom any such verdict or judgment shall have been had, or of any other person so named, in whose possession any copies of such libel, belonging to the person against whom any such verdict or judgment shall have been had, shall be, and in case admission shall be refused or not obtained, within a reasonable time after it shall have been first de- [*371] manded, to enter by force, by day, into any such house, building, or place whatsoever, and to carry away all copies of the libel there found, and to detain the same in safe custody until the same shall be restored under the provisions of this act, or disposed of according to any further order relating thereto."

(z) Sect. 2. "That if, in any such case as aforesaid, judgment shall be arrested, or if, after judgment shall have been entered, the same shall be reversed upon any writ of error; all copies so seized shall be forthwith returned to the person or persons, from whom the same shall have been so taken as aforesaid, free from all charge and expense, and without the payment of any fees whatever; and in every case in which final judgment shall be entered upon the verdict so found against the person or persons charged with having composed, printed, or published such libel; then all copies so seized shall be disposed of as the court in which such judgment shall be given, shall order and direct."

(a) Sect. 4. "And be it further enacted, that if any person shall, after he

may be inflicted for high misdemeanors, or to banishment from the King's dominions.

passing of this act, be legally convicted of having composed, printed, or published any blasphemous libel, or any such seditious libel as aforesaid, and shall after being so convicted offend a second time, and be thereof legally convicted before any commission of Oyer and Terminer, or goal delivery, or in his Majesty's Court of King's Bench, such person may, on such second conviction, be adjudged, at the discretion of the court, either to suffer such punishment as may now by law be inflicted in cases of high misdemeanor, or to be banished from the United Kingdom, and all other parts of his Majesty's dominions for such term of years as the court in which such conviction shall take place shall order."

Sect. 5. "And be it further enacted, that in case any person so sentenced and ordered to be banished as aforesaid, shall not depart from this United Kingdom within 30 days after the pronouncing of such sentence and [*372] order as aforesaid, for the *purpose of going into such banishment as aforesaid, it shall and may be lawful to and for his Majesty to convey such person to such parts out of the dominions of his said Majesty, as his Majesty by and with the advice of his privy council shall direct."

Sect. 6. "And be it further enacted, that if any offender who shall be so ordered by any such court as aforesaid, to be banished in the manner aforesaid, shall, after the end of forty days from the time such sentence or order hath been pronounced, be at large within any part of the United Kingdom, or any other part of his Majesty's dominions, without some lawful cause, before the expiration of the term for which such offender shall be so ordered to be banished as aforesaid, every such offender being so at large as aforesaid, being thereof lawfully convicted, shall be transported to such place as shall be appointed by his Majesty for any term not exceeding fourteen years; and such offender may be tried before any Justice of Assize, Oyer and Terminer, Great Sessions, or Gaol Delivery, for the county, city, liberty, borough, or place, where such offender shall be apprehended and taken, or where he or she was sentenced to banishment; and the clerk of assize, clerk of the peace, or other clerk or officer of the court, having the custody of the records where such order of banishment shall have been made, shall, when thereunto required on his Majesty's behalf, make out and give a certificate in writing, signed by him, containing the effect and substance, omitting the formal part of every indictment and conviction of such offender, and of the order for his or her banishment to the Justices of Assize, Oyer and Terminer, Great Sessions, or Gaol Delivery, where such offender shall be indicted; for which certificate six shillings and eight pence and no more shall be paid, and which certificate shall be sufficient proof of conviction and order for banishment of any such offender."

By the 7th section, the certificate of the clerk of the peace, clerk of assize, or other officer of the court, having the custody of the records, &c. shall be sufficient proof of the conviction of such offender.

• PRECEDENTS.

1. *Declaration by Bill in the King's Bench for Words of Felony.*

MIDDLESEX (*a*) TO WIT. A. B. the plaintiff (*b*) in this suit, complain's of C. D. (*c*) the defendant in this suit, being in the custody of the marshal of the Marshalsea of our [*373] Lord the now King before the King himself of a plea of trespass on the case, &c.

(A) For that whereas (*d*) the said plaintiff is a good, honest, true, and faithful subject of the realm, and as such hath always behaved and conducted himself, and until the committing of the grievances hereinafter mentioned was always reputed and esteemed to be a person of good name, fame, and credit, to wit, at, &c. (B) And whereas also the said plaintiff hath never been guilty (*e*) nor until the commission of the said grievances been suspected to have been guilty of the *felonies* (or misdemeanors *as the case may be*) and offences hereinafter mentioned to have been charged upon and imputed to him, the said plaintiff, or any other such crimes (or misdemeanors) or offences, *by means whereof he, the [*374] said plaintiff, before the committing of the said grievances, had deservedly obtained the good opinion and credit of all the good and worthy subjects of the realm to whom he was known, to wit, at, &c. (C).

(*a*) The venue is transitory. See 1 T. R. 571, 647. Supra vol. I. 342. See also *ib.* as to a change of venue.

(*b*) As to the joinder of plaintiffs, see vol. I. 347.

(*c*) As to the joinder of defendants, see vol. I. 354.

(*d*) This general inducement of good character where the slander involves an imputation on character, is usual but unnecessary, for the law presumes against misconduct until the contrary be duly proved; and see 1 Lev. 197. Styles 218. Starkie on Evidence, tit. Presumption.

(*e*) This exculpatory averment though usual, does not seem to be essential, especially as the charge is afterwards alleged to have been *falsely* made: if it were truly made it lies on the defendant to allege and prove the truth. See 2 Wils. 147, supra vol. I. 434, 435.—Hooker v. Tucker, Holt's R. 39. Bendish v. Lindsay, 11 Mod. 194.

Yet (*f*) the said defendant well knowing the premises but contriving and maliciously intending (*g*) to injure the said plaintiff in his good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, and to cause it to be suspected and believed that he was guilty of the felonies (or misdemeanors as the case may be) and offences hereinafter mentioned to have been imputed to him by the said defendant, and to subject him to the pains and penalties by law provided against persons guilty thereof, and to vex, harass, oppress, and ruin him, the said plaintiff, heretofore, to wit, on, &c., at, &c. (*h*) in a certain discourse which he the said defendant, then and there had in the presence and hearing of divers good and worthy subjects (*i*) of the realm, of and concerning the said plaintiff (*k*) in the presence and hearing of the said [*375] last-mentioned subjects falsely and maliciously spoke and published (*l*) of and concerning the said plaintiff (*m*) the several false, scandalous, malicious, and defamatory words (*n*) following, that is to say. He (*o*) (meaning the said plaintiff) is a

(*f*) Where extrinsic averments are essential of facts in relation to which the words or libel are actionable, they are usually introduced immediately before this averment. See the next precedent.—As to the necessity for such averments, see vol. I. p. 391.

As to such averments great caution and discretion are requisite; to introduce extrinsic facts unnecessarily may be prejudicial either in imposing the burthen of unnecessary proof on the plaintiff, or in relieving the defendant from the allegation and proof of that which is essential to his defence. This is not all: it is often matter of policy, independent of the immediate object of the pleader, to set forth a good cause of action, to introduce allegations with the collateral view of allowing the plaintiff to go into evidence from which he would otherwise be excluded. It sometimes happens that extrinsic facts of little importance to the mere legal cause of action are of great importance with a view to the introduction of such evidence as is likely to influence a jury; care should, however, be taken to introduce other counts strictly confined to the legal and technical cause of action.

(*g*) As to the necessity for an averment of malice, see vol. I. 433, and the authorities there cited.

(*h*) The precise day or place is not material.

(*i*) As to these allegations see vol. I. p. 360. It seems to be sufficient to allege that the words were spoken in the presence of divers persons without alleging that those persons heard or understood the words, for that will be presumed till the contrary be shown, vol. I. 360. Secus, it seems, where the words were spoken in a foreign language. Ib. 361.

(*k*) As to the necessity for a colloquium and its office, see vol. I. 363.

(*l*) As to the necessity for this allegation, see vol. I. 433, et seq.

(*m*) As to this allegation, see vol. I. 383, 384, where the words were spoken of a third person, this allegation is said to be necessary though a colloquium be laid, but where the words were spoken to the plaintiff himself, and there is an innuendo of the plaintiff, the omission of this allegation would not be material.—Ib.

(*n*) As to the necessity for stating the words correctly and the consequences of variance, see vol. I. 369, et seq.

(*o*) As to the nature and office of an innuendo, see vol. I. 418.

thief. He (meaning the said plaintiff) stole a horse. I can prove him (meaning the said plaintiff) to be a thief; he (meaning the said plaintiff) ought to have been hanged many years ago (*p*).

2nd Count—For Words spoken to the Plaintiff.

And for that whereas also the said defendant contriving and maliciously intending as aforesaid, afterwards, to wit, on, &c. at, &c. in a certain discourse which he the said defendant then and there had with the said plaintiff, in the presence and hearing of divers other good and worthy subjects of this realm, of and concerning the said plaintiff, falsely and maliciously spoke and published of and concerning the said plaintiff (*q*) in the presence and hearing of the said last-mentioned subjects, the several false, scandalous, malicious, and defamatory words following, that is to say, You (meaning the said plaintiff) are a thief (*r*). You (meaning the said plaintiff) stole a horse. *You (mean- [*376] ing the said plaintiff) ought to be hanged. I can prove you (meaning the said plaintiff) a thief, and it is in my power to hang you (meaning the said plaintiff). Whereby the said plaintiff hath been and is greatly injured in his aforesaid good name, fame, and credit, and brought into public scandal, infamy, and disgrace, with and amongst all his neighbours and other good and worthy subjects of the realm, insomuch that divers of those neighbours and subjects have on occasion of the committing of the said grievances from thence hitherto suspected and believed, and still do suspect and believe the said plaintiff to be guilty of the felonies (*or misdemeanors as the case may be*) and offences hereinbefore mentioned to have been imputed to the said plaintiff, and have from thence hitherto by reason thereof wholly refused and still do refuse to have any dealing or communication with him the said plaintiff; and the said plaintiff hath been and is, by reason of the premises, greatly injured and damnified (*s*), to wit, at, &c.

(*p*) Where the words themselves manifestly import a charge of a specific crime, it is unnecessary to introduce any innuendo as to their meaning, see vol. I 428, 9. *Peake v. Oldham*, Cowp. 275. But such an innuendo that the defendant thereby meant to charge the specific offence of murder or larceny, would not vitiate the declaration where such an intention could be collected from the words.—*Id.*

(*q*) *Supra* note (i) and vol. I. p. 360. Where the words were spoken to the plaintiff himself, a colloquium and innuendo are sufficient without this further averment.

(*r*) As to the actionable meaning of the terms, see vol. I. p. 99.

(*s*) Where the plaintiff has suffered any special damage, &c. in respect of which he claims compensation, it ought to be specially alleged, see vol. I. 489.

2. *Declaration against C. D. for charging A. B. with Perjury in giving Evidence on the Trial of a Cause.*

State the general inducement of good character as in Precedent 1, from (A) to (C) and then proceed as follows :

And whereas a certain issue (or certain issues according to the fact) joined between E. F. and G. H. in a plea of—in the court of our said Lord the King before the King himself, to wit, at Westminster, was (or were) duly tried at the assizes held in and for the county of—at—in the said county of—on, &c. by a certain jury of that county, in that behalf, before—the Justices of our said Lord the King assigned to take the assizes in the said county of*—(s). And the said A. B. at the said trial was then and there duly sworn before the said Justices at the said assizes, and was then and there examined and gave his evidence as a witness upon the said trial (t), yet the said C. D. well knowing the premises, but contriving and maliciously intending to injure the said A. B. in his said good name, fame and character, and to bring him into public scandal, infamy, and disgrace, and to cause it to be suspected and believed that he was guilty of perjury, and to subject him to the pains and penalties by law provided against persons guilty thereof, and to vex, harass, oppress, and ruin him the said plaintiff, heretofore to wit, on, &c. at, &c. in a certain discourse which he the said defendant then and there had in the presence and hearing of divers good and worthy subjects of the realm, of and concerning the said A. B., and of and concerning (u) the trial of the said issue (or issues), and the said evidence so as aforesaid given by the said A. B. at and upon the said trial, he the said C. D. then and there in the presence and hearing of the said last-mentioned subjects, falsely and maliciously spoke and published of and concerning the said A. B., and the said trial, and the said evidence so given by the said A. B. on the said trial, the several false, scandalous, malicious, and defamatory words following. that is to say, He (meaning the said A. B.) forswore himself at the trial of that cause (meaning the said trial above-mentioned).

2nd Count.—AND for that the said C. D. contriving and intending as aforesaid, afterwards to wit, on, &c. at, &c. in a certain other discourse which he the said C. D. then and there had in the

(s) It would be sufficient to aver more concisely that at the assizes held on, &c. at, &c. in and for the county of—, a certain cause came on to be tried before a jury in that behalf duly taken, wherein one M. N. was the plaintiff, and one O. P. the defendant.

(t) See in general as to the necessity for a mode of alleging extrinsic facts, vol. I. p. 391.

(u) As to the necessity for this averment, see vol. I. p. 412.

presence and hearing of divers other good and worthy subjects of this realm, of and concerning the said A. B., and of and concerning the said trial, falsely and *maliciously [*378] spoke and published, in the presence and hearing of the said last mentioned subjects, the several other false, scandalous, malicious, and defamatory words following, of and concerning the said A. B., and of and concerning the said trial, and of and concerning the said evidence, so as aforesaid, given by the said A. B. on the said trial, that is to say, He (meaning the said A. B.) swore himself at——(meaning at the said trial of the said issue).

Conclude as in Precedent 1.

3. *For Words imputing Dishonesty to a Tradesman (x).*

(*General inducement of good character as in Precedent 1, from (A) to (B) and then as follows :*)

AND whereas also the said plaintiff before and at the time of the committing of the said grievances, and from thence hitherto, hath used and exercised and still uses and exercises the business of a tailor (*y*), and hath always conducted himself and still continues to conduct himself with honesty and integrity in his said trade or business, to wit, at, &c., and hath never been guilty nor until the committing of the said grievances been suspected to have been guilty of any cheating, fraud or dishonesty in his said trade or business, or otherwise. By means whereof the said plaintiff, before the committing of the said grievances, had not only deservedly obtained the good opinion, confidence, and credit of all his neighbors, and other good and worthy subjects of the realm to whom he was any wise known, but had acquired and was still continuing to acquire in his said trade or business divers great profits and emoluments, for his maintenance and support, to wit, at, &c. Yet the said defendant, well knowing the premises, but contriving *and [*379] wickedly and maliciously intending to injure the plaintiff in his said good name fame, and credit, and in his said trade or business, and to bring him into public scandal, infamy, and disgrace, and to cause it to be suspected and believed that he the said plaintiff was guilty of fraud and dishonesty, and of cheating and imposing on his customers in his said trade or business, and to oppress and ruin him the said plaintiff, heretofore, to wit, on, &c. at, &c.,

(*x*) See in general as to words actionable in respect of special character, vol. I. p. 117.

(*y*) *Supra*, vol. I. p. 117; and in general as to the mode of alleging the plaintiff's special character, see vol. I. p. 400.

in a certain discourse which he the said defendant then and there had of and concerning the said trade or business (z), in the presence and hearing of divers good and worthy subjects of the realm, falsely and maliciously spoke and published of and concerning the said plaintiff, in his said trade or business, in the presence and hearing of the last mentioned subjects, the several false, scandalous, malicious, and defamatory words following, that is to say, He (meaning the said plaintiff) (*set out the words with innuendoes (a).*) By means whereof he the said plaintiff hath been and is greatly injured in his aforesaid good name and credit, and brought into public scandal, infamy, and disgrace, with and amongst all his neighbors and other good and worthy subjects of this realm, insomuch that divers of those neighbors and subjects have by reason of the committing of the said grievances from thence hitherto suspected and believed, and still do suspect and believe the said plaintiff to be guilty of fraud and dishonesty in his said trade or business, and have by reason thereof wholly refused to have any further dealings or transactions with the said plaintiff in the way of his said trade or business or otherwise; and the said plaintiff hath been and is greatly injured and damnified in his said trade and business and otherwise, and in particular by reason of the premises A. B., C. D., and E. F., who before the committing of the said grievances had been and were customers and employers of the said plaintiff in his said trade or business, not knowing the innocence of the said plaintiff in the premises, have by reason of the committing of the said

[*380] grievances suspected the said plaintiff *to have been guilty of fraud and dishonesty in his said trade or business, and have wholly refused further to retain or employ the said plaintiff or to have any further dealing with him in his said trade or business, as but for the committing of the said grievances they otherwise would have done (a), to wit, at, &c.

4. *For Words of Insolvency spoken of a Tradesman (b).*

(*State the General inducement of good character as in Precedent 1, from (A) to (B). then proceed :*

AND whereas also the said plaintiff before and at the time of the

(z) As to the necessity for this averment, see vol. I. p. 213.

(a) See vol. I. p. 418.

(a) As to the averment of damage and the necessity for averring special damage, see vol. I. p. 439.

(b) See in general as to words of insolvency, vol. I. p. 127—8.

committing of the said grievances, and from thence hitherto hath used and exercised, and still uses and exercises the trade or business of a *silversmith* (*according to the fact*) and has always used and exercised, and still uses and exercises his said trade or business with integrity and punctuality, and hath always well and truly paid and discharged all his just debts and obligations, and hath not been, nor is, nor until the committing of the said grievances been suspected to be, either unable or unwilling duly and faithfully to pay and discharge all such debts and obligations, to wit, at, &c. By means whereof the said plaintiff, before the committing of the said grievances, had not only deservedly obtained the good opinion, confidence, and credit of all his neighbours and other good and worthy subjects of the realm to whom he was in any wise known, but had acquired, and was still continuing to acquire in his said trade or business divers large profits and emoluments, to wit, at, &c. Yet the said defendant well knowing the premises, but contriving and wickedly and maliciously intending to injure the said plaintiff in his said good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, and to cause it to be *suspect- [*381] ed and believed that he the said plaintiff was in poor and indigent circumstances, and incapable of paying and discharging his just debts and obligations, and to oppress and ruin him the said plaintiff, heretofore, to wit, on &c., at, &c., in a certain discourse which he the said defendant then and there had of and concerning the said plaintiff in his said trade or business, falsely and maliciously spoke and published of and concerning the said plaintiff in his said trade or business, the several false, scandalous, malicious, and defamatory words following, that is to say, He (meaning the said plaintiff) owes more money than he is worth. He (meaning the said plaintiff) is run away. He (meaning the said plaintiff) is broke.

By means whereof he the said plaintiff hath been, and is greatly injured in his aforesaid good name and credit, and brought into public scandal, infamy, and disgrace, with and amongst all his neighbours and other good and worthy subjects of the realm, inso-much that divers of those neighbours and subjects have, by reason of the committing of the said grievances, from thence hitherto suspected and believed, and still do suspect and believe the said plaintiff to be insolvent and incapable of paying and discharging his just debts, and have by reason thereof wholly refused to have any further dealings or transactions with the said plaintiff in the way of his trade or otherwise; and the said plaintiff hath been and is greatly injured and damaged in his said trade and business and otherwise, to wit, at &c.

5. For a Libel against an Attorney.

(General inducement of good character as in Precedent 1, from (A) to (B) and then as follows:)

And for that whereas also the said A. B. for a long time before the composing and publishing of the false, scandalous, malicious, and defamatory libel, by the said C. D. hereinafter mentioned, had been, and was, and still is an attorney (c) of the court of [*382] our said Lord the *King before the King himself, and also a solicitor of the high court of Chancery, and had used, exercised, and carried on the profession and business of an attorney and solicitor, with great credit and reputation, and had acquired and was still continuing to acquire divers large gains and profits in his said profession and business, to wit, at &c. and whereas also the said A. B. and one E. F. another of the attorneys of the court of our said Lord the King before the King himself, and also a solicitor of the said high court of Chancery, had, as such attorneys and solicitors, been concerned in the prosecution of a certain commission of bankruptcy against the said C. D., and in divers proceedings and disputes concerning his estate and effects, and had always behaved and conducted themselves therein with skill, care, judgment, and integrity, to wit, at, &c. aforesaid. Yet the said C. D., well knowing the premises, but contriving, and falsely and fraudulently intending, to injure the said A. B. in his credit and reputation aforesaid, and also in his said profession and business of attorney and solicitor as aforesaid, and to cause it to be suspected and believed that he the said A. B. had conducted himself dishonestly, injudiciously, and improperly, in relation to the said commission of bankruptcy proceedings and disputes, and to vex, harass, oppress, impoverish, and wholly ruin him the said A. B., heretofore, to wit, on, &c., at, &c., wrongfully, maliciously, and injuriously composed, wrote, and published, and caused to be composed, written, and published (d), a certain false, scandalous, malicious, and defamatory libel, of and concerning the said A. B. and E. F., in the way of, and in respect to their profession and business of attorneys and solicitors, and of and concerning their prosecution of the said commission as such attorneys and solicitors, and their conduct as such attorneys and solicitors in such proceedings and disputes in which they were so concerned as aforesaid, under the said commission of bankruptcy, in the form of, and as a letter addressed to, &c., in

(c) As to the allegation of special character, see vol. I. p. 400.

(d) As to the averment of publication, vide supra vol. I. p. 358.

which said letter was and is contained, amongst other things, the false, scandalous, *defamatory, and libellous [*383] words and matters following, of and concerning the said A. B. and E. F. in the way of and in respect to their profession and business of attorneys and solicitors, and of and concerning their prosecution of the said commission as such attorneys and solicitors, and their conduct as such attorneys and solicitors. in such proceedings and disputes in which they were so concerned as aforesaid, under the said commission of bankruptcy. (*Here set out the letter verbatim, with appropriate innuendoes*). By means of the composing, writing, and publishing of which said false, scandalous, malicious, and defamatory libel by the said C. D. as aforesaid, the said A. B. hath been, and is greatly prejudiced in his credit and reputation aforesaid, and brought into public scandal, infamy, and disgrace, and hath been and is suspected to have acted dishonestly and unskilfully in the way of his said business and profession of an attorney and solicitor and to have conducted himself dishonestly, injudiciously, and improperly, in relation to the said commission of bankruptcy, proceedings and disputes, and has been greatly vexed, harassed, oppressed, and impoverished, and has also lost and been deprived of divers great gains and profits which would otherwise have arisen and accrued to him in his said profession and business, and hath been, and is otherwise much injured and damnified therein, to wit, at, &c., to the damage, &c.

6. *For Words imputing Ignorance and Unskilful Treatment of a Patient to an Apothecary.*

(*General Inducement of good character as in Precedent 1, from (A) to (B) and then as follows :*)

AND whereas the said plaintiff before and at the time of the committing of the grievances hereinafter mentioned, practised and exercised, and still continues to practice and exercise the art or business of an apothecary (e), and hath always conducted himself, and still *continues to conduct himself in the [*384] practice of his said art or business with great skill, care, and humanity, in preparing, administering, and applying wholesome and proper medicines for healing and curing divers subjects of this realm of many diseases and disorders under which they respectively laboured, by means whereof the said plaintiff, before the committing of the said grievances, had deservedly obtained and

acquired the good opinion, esteem, and confidence of all his neighbours, and other good and worthy subjects of the realm to whom he was in any wise known, and had acquired, and was still continuing to acquire divers great gains and profits by the practice of his said art or business, to wit, at, &c. And whereas also (*f*) the said plaintiff whilst he so practiced and exercised his said art or business and before the committing of the said grievances, to wit, on, &c., at &c., was sent for as such apothecary to attend and visit in the way of his said art or business the child of one E. F., which was then sick, and which before the committing of the said grievances died, and during his attendance on the said child, he the said plaintiff prepared and administered to the said child wholesome and proper medicines, according to the nature of the disorder of the said child, to wit, at, &c. Nevertheless the said defendant, well knowing the premises, but contriving and maliciously intending to prejudice and injure the said plaintiff in his good name, fame, credit, and esteem, in his aforesaid art or business, and to cause the said plaintiff to be brought into public scandal, infamy, and disgrace, and reputed to be a person ignorant in his said art or business, on, &c. at, &c., in a certain discourse which the said defendant then and there had with divers subjects of this realm, of and concerning the said plaintiff, in his aforesaid art or business, and his attendance on the said child, and of and concerning the medicines and remedies which the said plaintiff had prepared for, and administered to the said child, the said defendant falsely and maliciously in [*385] the presence and hearing of those subjects, *spoke, proclaimed, and published, of and concerning the said plaintiff in his said art or business, and of and concerning his said attendance on the said child, the several false, scandalous, malicious, and defamatory words following, that is to say, He (meaning the said plaintiff) has a great deal to answer for; but for his (meaning the said plaintiff's) ignorance, (meaning ignorance in his said art or business) that child (meaning the said child whom the said plaintiff as such apothecary had attended, and to whom he had administered as aforesaid) would still have been living. His (meaning the said plaintiff's) medicines did the business.

2nd Count.—For the Words,—the medicine which he sent (meaning the medicine administered by the said plaintiff, as such apothecary, to the said child of the said E. F.) *was no better than poison.*

By means whereof the said plaintiff is much prejudiced, injured, and degraded in his good name, fame, credit, and reputation, and is

(*f*) See in general as to the necessity for and mode of alleging extrinsic facts, vol. I. p. 391.

fallen into public scandal and disgrace, and reputed to be a person ignorant in his said art or business of an apothecary, and divers of his friends and neighbours and other good and worthy subjects of the realm, have by reason of the committing of the said grievances, refused, and still do refuse to employ the said plaintiff in his aforesaid art or business of an apothecary as before they were used to do, and otherwise would have done, to the damage, &c.

7. *For Written Slander in giving the Character of a Servant.*

(*General inducement as in Precedent 1, from (A) to (B) and then as follows :*)

AND for that whereas the said A. B. before the committing of the grievances hereinafter mentioned, had been retained and employed by and in the service of the said C. D. as his butler and servant, and in that capacity had behaved with due integrity *good temper, activity, and civility, and never was, or un- [*386] til the time of the committing of such grievances, suspected to have been, or to be bad tempered, lazy, or impertinent, by means of which said several premises he the said A. B. before the committing of the said several grievances had not only deservedly obtained the good opinion of all his neighbours, and divers other good and worthy subjects of this realm, but had also supported himself, and would thereafter have supported himself by his honest, faithful, diligent, and attentive exertions in the service of his masters and employers, had not such grievances been committed as hereinafter mentioned, to wit, at, &c. And whereas the said A. B. before and at the time of the committing of such grievances, had quitted and left the service of the said C. D., and had been recommended to, and was likely to be retained and employed by and in the service of one E. F., as footman, for certain wages to be therefore paid to him the said A. B., to wit, at, &c. Yet the said C. D., well knowing the premises, but contriving and maliciously intending to injure the said A. B. in his said character, and to bring him into public scandal, infamy, and disgrace, with and amongst all his neighbours, and other good and worthy subjects of this realm, and particularly with the said E. F., and to cause it to be suspected and believed that the said A. B. was not fit to be employed as a servant, and that he was bad tempered, and a lazy and impertinent fellow, and thereby to prevent the said E. F. from retaining and employing him the said A. B. in his service as he otherwise might and would have done, and to vex, and harass, oppress, impoverish, and wholly ruin him the said A. B., and to deprive him

of the means of supporting himself by honesty and industrious means heretofore, to wit, on, &c., at, &c., aforesaid, wrongfully and unjustly did compose and publish a certain false, scandalous, malicious, and defamatory libel, of and concerning the said A. B. as such servant, containing, amongst other things, the several false, scandalous, malicious, and defamatory words and matters following, of and concerning the said A. B., as such servant, that [*387] is to say, He (meaning the said *A. B.) is a bad tempered, lazy, impertinent fellow, (thereby then and there meaning that the said A. B., was not a person fit to be retained and employed in the capacity of a servant).

2nd Count.—And the said A. B. further says that the said C. D. further contriving and intending to injure and damnify the said A. B. as aforesaid, afterwards, to wit, on, &c., at, &c. falsely, wickedly, maliciously, wrongfully, and unjustly, did publish, and cause and procure to be published, a certain other false, scandalous, malicious, and defamatory libel, of and concerning the said A. B. as such servant as aforesaid, containing the several false, scandalous, malicious, and defamatory words and matters following, of and concerning the said A. B., as such servant as aforesaid, that is to say, He (meaning the said A. B.) is a bad tempered, lazy, and impertinent fellow, by means of the committing of which said grievances the said A. B. hath been and is greatly injured in his said good character, and brought into public scandal, infamy, and disgrace, with and amongst all his neighbours and other good and worthy subjects of the realm to whom he was in any wise known, insomuch that divers of those neighbours and subjects, and in particular the said E. F., to whom the good temper, fidelity, activity, and civility of the said A. B. in the capacity of a servant or otherwise were unknown, have on occasion of the committing of the said grievances, from thence hitherto, suspected and believed, and the said E. F. still doth suspect and believe the said A. B. to have been and to be a bad tempered, lazy, and impertinent person, and unfit to be retained or employed in the capacity of a servant, and also by reason thereof, the said E. F. afterwards, to wit, on, &c. aforesaid, at, &c. aforesaid, refused and declined to retain and employ the said A. B. in his service as a footman or otherwise, as he otherwise might and would have done, and by reason thereof, he the said A. B. hath not only lost and been deprived of the support, sustenance, wages, gains, and emoluments which might and would otherwise have arisen and accrued to him from and by reason of his being so retained and employed as last aforesaid, but hath [*388] from *thence hitherto remained and continued, and still is out of employ, deprived of the opportunity of supporting himself by honest and industrious means, and hath been and

is, by means of the said several premises, otherwise greatly injured and damnified, to wit, at, &c. aforesaid, to the damage, &c.

8. *Declaration for Words spoken of a Magistrate in his Office (s).*

(General averment of good character as in Precedent 1, from (A) to (B).)

AND whereas also the said plaintiff before and at the time of the committing of the said grievances by the said defendant was, and from thence hitherto hath been, and still is one of the Justices of our Lord the King assigned to keep the peace of our said Lord the King, in and for the county of ——— and also to hear and determine divers felonies and other misdemeanors committed in the said county, and during all that time governed and conducted himself in his said office with justice, uprightness, and integrity, to wit, at, &c. Yet the said defendant well knowing the premises, but contriving and wrongfully and maliciously intending to injure, prejudice, and aggrrieve him the said plaintiff, so being such justice as aforesaid, and to cause it to be suspected and believed that he, the said plaintiff, had acted unjustly and corruptly in his said office of justice of the peace, heretofore, to wit, on, &c., at, &c., in a certain discourse which he the said defendant then and there had in the presence and hearing of divers good and worthy subjects of the realm, of and concerning him the said plaintiff in his said office of justice, falsely and maliciously spoke and published of and concerning the said plaintiff in his said office, the several false, scandalous, malicious, and defamatory words following, that is to say, He (*set out the words with proper innuendoes.*)

*By means whereof the said plaintiff hath been and is greatly injured, prejudiced, and aggrieved in his said office, and in his good name, fame, and reputation, and divers of the [*389] good and worthy subjects of the realm have suspected and believed, and still do suspect and believe that the said plaintiff hath behaved and demeaned himself dishonestly and corruptly in his said office, and the said plaintiff hath been and is brought into public contempt, infamy, and disgrace, and hath been and is otherwise greatly injured and damnified, to wit, at, &c.

9. *For Words imputing Incontinence to an unmarried Woman, which occasioned special damage (t).*

(s) As to the right to maintain this species of action, see vol. I. 117.

(t) See the case of *More v. Meagher*, in error. *Supra* vol. I. 202. 1 Taunt.

(General inducement of good character as in Precedent 1, from (A) to (B).)

AND for that whereas also the said plaintiff hath always been a virtuous, modest, and chaste subject, and until the committing of the grievances hereinafter mentioned had always been esteemed to be of unblemished reputation, and that before and at the time of the committing of the said grievances, she the said plaintiff enjoyed the society and conversation, friendship and countenance of many worthy and estimable subjects of this realm, to wit, of A. B., C. D., &c. (*naming them*) and divers others, and lived associated with them on terms of mutual respect, confidence, and intimacy, and was by divers of those persons (*naming them*) received and entertained in their respective houses, and found and provided by them respectively with meat and drink gratuitously, and without any price or sum of money whatsoever, by her paid or payable for the same, to the great reduction of her necessary expenses, of living and maintaining herself, and the great increase of her riches, to wit, at, &c. Yet that the said defendant, well knowing the premises, and envying

[*390] the *happiness of the said plaintiff, and maliciously contriving and intending to injure and ruin her in her character, and to deprive her of the good will, society, conversation, friendship, and commerce of all her friends, relations, and acquaintances, and to impoverish her, and deprive her of all the benefits and advantages of her fortune and pecuniary circumstances, so by her received and receivable as aforesaid heretofore, to wit, on, &c., at, &c., in a certain discourse which he the said defendant then and there had in the presence and hearing of divers good and worthy subjects of this realm, of and concerning the said plaintiff, in the presence and hearing of the said last mentioned subjects, falsely and maliciously spoke and published, of and concerning the said plaintiff, the several false, scandalous, malicious, and defamatory words following, that is to say, (*set out the words imputing incontinence to the plaintiff, with innuendoes.*) By means of the speaking of which several false, scandalous, and defamatory words, the said plaintiff hath been, and is greatly injured in her credit and reputation, and brought into public scandal, infamy, and disgrace with and amongst all her neighbours and other good and worthy subjects of the realm, insomuch that the said last mentioned neighbours subjects, and friends, especially the several persons hereinbefore in that behalf named, to wit, the said A. B., C. D., &c. (*u*), have, by reason of

39, where it was held that such a declaration was good, and the plaintiff below had judgment [1].

(*u*) As to the necessity of stating the names, see vol. I. p. 441. 442. B. N. P. 7. Hartley v. Herring, 8 T. R. 140.

[1] See note [1] p. 202. vol. I.

the committing of the said grievances, refused to hold or permit any intercourse or society with her, or to receive, or to admit her into their respective houses or company, or to find or provide for her, meat, drink, or any other benefits and advantages, in any manner whatsoever, as they before that time had done, and otherwise would have continued to do, whereby the plaintiff hath lost all those valuable benefits and advantages, being to her theretofore of great value, to wit, of the value of 100*l.*, and hath been and is greatly reduced and prejudiced in her fortunes and pecuniary circumstances, and obliged to incur a much greater expense in her necessary living *and supporting herself, to wit, the annual amount [*391] of 100*l.*, than she theretofore had done, and otherwise would have continued to do, and hath been, and is by means of the premises, greatly damaged and impoverished, to wit, at, &c.

10. *Declaration for composing, printing, and publishing a Libel.*

FOR that whereas the said plaintiff is a good, true, honest, just and faithful subject of this realm, and as such hath always behaved, and conducted himself, and until the committing of the grievances by the said defendant as hereinafter mentioned, was always reputed, esteemed, and accepted by and amongst all his neighbours and other good and worthy subjects of this realm, to whom he was in any wise known, to be a person of good name, fame, and credit, to wit, at, &c. And whereas he the said plaintiff hath never been guilty, nor until the time of the committing of the said grievances, as hereinafter mentioned, been suspected to have been guilty of the offences and misconduct hereinafter mentioned to have been imputed to him, or of any such offences or misconduct. By means of which said several premises, he the said plaintiff, before the committing of the said grievances hereinafter mentioned, had deservedly obtained the good opinion and credit of all his neighbours and other good and worthy subjects of this realm, to whom he was known, to wit, at, &c. (x). Yet the said defendant, well knowing the premises, but contriving, and wickedly and maliciously intending to injure him in his said good name, fame, and credit, and to bring him into public scandal, infamy and disgrace, with and amongst all his neighbours and other good and worthy subjects of this realm, and to cause it to be suspected and believed by *those neigh- [*392] bours and subjects that he the said plaintiff had been and

(x) It is usual to introduce in this part of the declaration, by way of further inducement, such extrinsic facts, the averment of which is essential to the cause of action. As to such averments, see vol. I. 391, et seq.

was guilty of the offences and misconduct hereinafter mentioned to have been charged upon and imputed to him, and to vex, harass, and oppress him the said plaintiff, on, &c. at, &c. aforesaid, falsely, wickedly, and maliciously did compose (y), print, (z), and publish, and cause (a) and procure to be printed and published, of and concerning the said A. B., a certain false, scandalous, malicious, and defamatory libel, containing amongst other things (*if part only be set out*) in one part thereof, the false, scandalous, malicious, and defamatory words and matters following (b), of and concerning (c) the said plaintiff, that is to say, (*setting out the libellous passage with apt innuendoes,*) and also containing in another part thereof, the several other false, scandalous, malicious, and defamatory words and matters following, of and concerning the said plaintiff, that is to say, (*setting out another libellous passage with apt innuendoes*) and also containing in another part thereof the several other false, scandalous, malicious, and defamatory words, and matters following, of and concerning the said plaintiff, that is to say, (*setting out another libellous passage with apt innuendoes*).

[*393] * *Where there is any doubt as to the meaning or application of the libellous matter, it is usual to add other counts, with suitable variances as to such allegations.*)

By means of the committing of which said several grievances the said plaintiff hath been and is greatly injured in his good name, fame, and credit, and brought into public scandal, infamy, and disgrace with and amongst all his neighbours and other good and worthy subjects of this realm to whom he was in any wise known, insomuch that divers of those neighbours and subjects, to whom the

(y) The plaintiff on such a count may have a verdict for the publishing, though no proof be given of the composing, writing, or printing, see vol. II. p. 50, and Starkie on Evidence, tit. Libel. Variance.

(z) If the libel has been published in a public newspaper, it is usual to aver that the defendant did *compose, print, and publish in a certain public newspaper, &c.*, and not unfrequently the title of the newspaper is set out; it seems, however, to be sufficient to allege a printing and publishing simply, and danger of variance may be incurred in setting forth the title of the newspaper.

(a) Where the libel is in writing, it is usual to allege as follows—*did compose, write, and publish, and cause and procure to be written and published, of and concerning, &c., a false, scandalous, malicious, and defamatory libel, &c.*, and sometimes it is added, in the form of a letter to the plaintiff, &c., but it does not appear to be necessary that the particular mode or form of writing or publishing should be set out.

This allegation, *and cause, &c.* though usual, is wholly superfluous; for in legal consideration a man does that which he causes to be done; an allegation in the disjunctive would render the declaration demurrable.—Supra vol. I. 361.

(b) As to the statement of the libel, see vol. I. 366, &c.

(c) As to the necessity of this allegation, in order to connect the libel with the plaintiff, and such extrinsic facts as are previously stated, see vol. I. 412, et seq.

innocence of the said plaintiff was unknown, have, on occasion of the committing of the said several grievances by the said defendant, from thence hitherto suspected and believed, and still do suspect and believe the said A. B. to have been guilty of the offences and improper conduct imputed to him as aforesaid, and have by reason of the committing of the said several grievances by the said C. D., from thence hitherto refused, and still do refuse to have any acquaintance, intercourse, or discourse with the said plaintiff, and the said plaintiff hath been, and is, by means of the premises, otherwise greatly injured and damnified, to wit, at, &c., to the damage, &c.

11. *Declaration for a malicious Prosecution of a Charge of Felony before a Magistrate, and afterwards by Indictment at the Sessions, where the Grand Jury found no True Bill.*

(General inducement of good character, *supra*, Precedent 1, from (A) to (C), and then proceed.)

YET the said defendant, well knowing the premises, but contriving and maliciously intending to injure the said plaintiff in his good name, fame and credit, and to bring him into public scandal, infamy, and disgrace, and to cause him to be imprisoned and unjustly punished, and to impoverish, oppress, and wholly ruin him, heretofore, to wit, on, &c., at, &c., falsely and maliciously, and without any reasonable and probable cause *whatever, al- [*394] leged and objected against the said plaintiff, that he the said plaintiff had before then feloniously stolen, taken, and carried away, (*state the particulars*) of him the said defendant; and then and there, and for the said supposed offence, falsely and maliciously and without any reasonable or probable cause, arrested, and caused, and procured the said plaintiff to be arrested by his body, and carried and conveyed him, and caused and procured him to be carried and conveyed in custody before one M. N., Esq., then, and still being one of the justices of our Lord the King, in and for the said county of ———, and also to hear and determine divers felonies and trespasses, and other misdemeanors committed within the said county, and to be examined by and before the said M. N., so being such Justice as aforesaid, of, upon, and for the said supposed offence, and then and there, falsely and maliciously, and without any reasonable or probable cause whatever, caused and procured the said M. N., so being such Justice as aforesaid, to commit the said plaintiff into the custody of the keeper of a certain prison of our said Lord the King, in the said county, to wit, a certain prison of our said Lord the King, called ———, and to make out and grant,

under his hand and seal, as such Justice as aforesaid, a certain warrant or mandate, directed to the said keeper of the aforesaid prison, or his deputy, bearing date, on, &c., whereby the said Justice commanded (*f*), authorized, and required the said keeper of the said prison, or his deputy, to receive into his custody the body of the said plaintiff, for further examination as to the said offence imputed to and charged upon him the said plaintiff as aforesaid, on Thursday morning then next, at ten of the clock, and him safely keep in his custody until he should thence be discharged by due course of law, to wit, at, &c. aforesaid: and that the said defendant also then and there maliciously, and without any reasonable or probable cause, caused and procured the said plaintiff to be kept and detained in custody, in the aforesaid prison of our said Lord the King, under and by virtue of the aforesaid warrant or mandate, from thence until and upon, &c. and during that time, and afterwards, on, &c. aforesaid, at, &c., and before the aforesaid Justice, falsely and maliciously, and without any reasonable or probable cause whatever, again alleged and complained against him the said plaintiff, that he the said plaintiff had before then feloniously taken and carried away, (*set out the particulars*) of him the said defendant, and then and there falsely and maliciously and without any reasonable or probable cause whatever, caused and procured the said M. N. so being such Justice, to make and grant a certain other warrant, under his hand and seal as such Justice as aforesaid, bearing date, &c., and directed to the aforesaid keeper of the said prison, called——, or his deputy, whereby he the said Justice commanded (*g*), and required, and authorized the said keeper, or his deputy, to detain in his custody the body of the said plaintiff so charged and accused before him the said Justice as last aforesaid, and him safely keep in his custody until he should be discharged by due course of law; and that the said defendant did then and there falsely and maliciously, without any reasonable or probable cause whatever, cause and procure the said

(*f*) This of course should be according to the fact. It does not appear to be necessary to set out the particulars of such warrant to detain the prisoner for further examination; it would, it seems, be sufficient to aver that the defendant maliciously and without any reasonable or probable cause, caused and procured the said Justice to order that the said plaintiff should be detained and confined in a certain prison there, in order to his further examination as to the said supposed offence, so imposed and charged on him the said plaintiff, as aforesaid, and maliciously, and without any reasonable or probable cause, caused and procured the said plaintiff to be kept and detained in the said prison there for a long space of time, to wit, for the space of—— days, and afterwards, to wit on, &c., at, &c.

(*g*) This of course must be stated according to the warrant itself, which must be produced and proved.

plaintiff to be detained and kept in custody, as well in the said prison called —, as aforesaid, as in a certain other prison of our said Lord the now King, called —, under, and by virtue, and in consequence of the said last-mentioned warrant or mandate, for a long space of time, and until his discharge hereafter mentioned, to wit, at, &c. aforesaid. And the said plaintiff, in fact, further saith, that whilst *he the said plaintiff was so in custody as afore- [*396] said, to wit, at (*h*) the general quarter sessions of the peace of (*i*) our said Lord the King, holden in and for the county of —, at —, on, &c. before A. B., Esq., &c., and others their fellows Justices of our said Lord the King, assigned to keep the peace, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, falsely and maliciously, and without any reasonable or probable cause whatever, preferred, and presented, and caused to be preferred and presented to the jurors of the Grand Inquest then and there, to wit, at the said sessions, sworn and charged to inquire for our Lord the King, and the body of the said county of —, a certain bill (*k*) (of indictment) against the said plaintiff, by the name and description of, &c., charging, and accusing, and purporting, that the said plaintiff, on, &c. (*set out the substance of the charge*) (*l*), with the intent that the same should then and there be found a true bill by the said jurors, which said bill the said jurors of the said Grand Inquest did then and there return into the said court of the said sessions so holden as aforesaid, not found (*m*), *whereupon [*397] the said plaintiff was then and there discharged from and out of custody, and the said prosecution and complaint against him the said plaintiff then and there became and were abandoned by the said defendant, and wholly ended and determined.

(*h*) It seems to be now settled that a defect in the jurisdiction of the court, or in the indictment, will not preclude the plaintiff from maintaining his action, and, therefore, no averment as to the competency of the court is necessary.—Supra vol. I. 446. 2 Wils. 102. Com. Dig. Action on the case for a conspiracy, c. 4. Rol. Ab. Action Sur Case, 50. 4 T. R. 247. 2 Str. 691. 1 Salk. 15.

(*i*) As to setting out the style of court, see vol. I. 446.

(*k*) Until a bill is found by the Grand Jury, it is a bill and not an indictment, and ought in strictness to be so described, vide supra vol. I. 445. Com. Dig. Ind. B. 5 Taunt. 187. 1 Salk. 376. But it is not unusual, where a bill has been found, to allege that the defendant “indicted, and caused and procured to be indicted, the said plaintiff.” See 2 Burr. 993.

(*l*) As to setting forth cumulative charges, see vol. I. 446. It is sufficient to prove that any one of the charges in the bill of indictment was maliciously preferred, see vol. I. 446. Reed v. Taylor, 4 Taunt. 616. The charge should be set out in substance only, vol. I. 447. As to the degree of particularity and accuracy with which this should be done, see vol. I. 447.

(*m*) The declaration must show that the prosecution was determined, supra vol. I. 449, 450. The allegation that the Grand Jury threw out the bill, serves sufficiently to show a determination.—2 T. R. 232. Supra vol. I. 451.

2nd Count.—And the said defendant, further contriving and intending as aforesaid, at the aforesaid general quarter sessions of the peace, holden in and for the county of ———, at, &c. on, &c., before, &c. and others their fellows Justices of our said Lord the King, assigned to keep the peace, &c., and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, falsely and maliciously, and without any reasonable or probable cause whatever, preferred and prosecuted, and caused to be preferred and presented to the jurors of the Grand Inquest then and there, to wit, at the said sessions, sworn and charged to inquire for our said Lord the King and the body of the said county, a certain other bill of indictment against the said plaintiff, by the name, &c., of, &c., charging, accusing, and purporting, that the said plaintiff, on the aforesaid day, &c., feloniously stole, (*set out the particulars*) of the said defendant, which last mentioned bill of indictment the jurors of the said Grand Inquest did then and there return into the said court of the said sessions so holden as aforesaid, not found (*n*).

3rd Count.—And for that whereas the said defendant further contriving and intending as aforesaid, on, &c., at, &c., falsely and maliciously, and without any reasonable or probable cause whatsoever, imposed the crime of felony (*o*) on him the said plaintiff, by means of which said several premises, the said plaintiff is greatly hurt, injured, and prejudiced in his said good name, fame, and credit, and is brought into great scandal, ignominy, and disgrace amongst all his neighbours and other good and worthy subjects of
 [*398] the realm, and hath been taken, and suspected to *be a felon and a thief, and he the said plaintiff was also imprisoned, and kept and detained in prison, in manner and for the time hereinbefore mentioned, and suffered and underwent many and great troubles and labours, both of body and mind, and during all which time he was hindered and prevented from managing, conducting, and transacting his necessary affairs and business, and was forced and obliged to lay out and expend a large sum of money in and about the obtaining his release from and out of custody as aforesaid, and in and about the defence of himself and the manifestation of his innocence in the premises so alleged and objected against him as aforesaid, and he the said plaintiff also was, hath been, and is, on occasion of the several premises aforesaid, otherwise greatly injured and damaged, to wit, &c.

(*n*) Supra note (*m*).

(*o*) As to the sufficiency of this general count, see vol. I. 448. *Davis v. Noak*, 1 Starkie's C. 377. *Blizard v. Kelly*, 2 B. and C. 285.

12. *General Form of Declaration for a malicious Prosecution by indictment at the Assizes or Sessions, where the Plaintiff was acquitted.*

For that the said defendant maliciously and wickedly intending to oppress and injure him the said plaintiff, on &c., at, &c., maliciously, and without any reasonable or probable cause whatsoever, charged the said plaintiff with the crime of felony, and caused and procured the said plaintiff to be arrested and committed to the common goal for the county of ———, and there to be imprisoned, by reason of that charge, for a long space of time, to wit, for the space of ———, and afterwards, to wit, on, &c., at the session of our Lord the King, of oyer and terminer, &c. (o), holden at, &c., in and for the said county of ———, before, &c., maliciously, and [*399] without any reasonable or probable cause indicted and caused and procured to be indicted the said plaintiff, for that he the said plaintiff (p), on, &c., at, &c., (*set forth the substance of the charge.*) and that the said defendant falsely and maliciously, and without any reasonable or probable cause whatsoever, prosecuted and caused and procured to be prosecuted the said indictment against the said plaintiff, to wit, at, &c., until the said plaintiff, afterwards, to wit, at the (q) delivery of the goal of our said Lord the King, of his said county of ———, of the prisoners therein holden, on &c., at &c., before, &c., assigned to deliver the goal of the said county of the prisoners therein being, was duly, by a jury of the said county, and by the judgment of the said court of goal delivery (r), duly acquitted of the premises in the said indictment charged, and the said charge and prosecution then and there became and were wholly ended and determined.

Add a general count for imposing the crime of felony, as in Precedent 11.

By means whereof he the said plaintiff hath been and is greatly injured and aggrieved in his good name, fame, and credit, and hath suffered and undergone great trouble and labor of his body, and

(o) Or if the prosecution were at the sessions, *thus*, at the General Quarter Sessions of the peace, holden (*by adjournment, if that be a fact,*) in and for the said county of ———, on &c., at, &c., before A. B., C. D. and others, their fellows, Justices of our said Lord the King, assigned to keep the peace in the county of ——— and also to hear and determine divers felonies, trespasses, and other misdemeanors committed in that county. This statement ought of course to accord with the caption of the indictment and record of acquittal.

(p) See vol. I. p. 446.

(q) Or if the acquittal were at the quarter sessions, *thus*—"General Quarter Sessions of the peace of our said Lord the King, holden (*by adjournment, if such be the fact*) on, &c., at, &c., before, &c." The statement should agree with the record of acquittal.

(r) Or Quarter Sessions, according to the fact.

anxiety of mind, and been put to great expense of his moneys, to wit, to the amount of ———, in the manifesting his innocence and procuring his acquittal, and hath also been wholly hindered and prevented from transacting his necessary business and affairs, and hath been, and is otherwise greatly injured, prejudiced, and aggrieved, to wit, at, &c.

*13. *Plea of the General Issue (s).*

[*400] AND the said defendant, by E. F. his attorney, comes and defends the wrong and injury, when, &c. and saith that he is not guilty of the premises to above laid his charge in manner and form as the said plaintiff hath above complained against him, and of this he the said defendant puts himself upon the country, &c.

14. *Plea of Justification of Words of Felony.*

AND for a further plea in this behalf (s), the said defendant, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, saith that the said plaintiff ought not to have or maintain his aforesaid action thereof against him the said defendant, because he saith that the said plaintiff before the speaking and publishing of the words in the said declaration mentioned, to wit, ou, &c. at, &c. (t) feloniously did steal, take, and carry away, (*describing the goods*) (u), of the goods and chattels of him the said defendant. Wherefore he the said defendant at the said several times in the said declaration mentioned, did speak and publish of and concerning the said plaintiff the said several words in the said declaration mentioned (x), as he lawfully might for the cause aforesaid, and this he the said defendant is ready to verify. Wherefore

(s) As to the sufficiency of this plea to enable the defendant to go into evidence in his defence, see vol. I. 453. Where a special justification is pleaded it is frequently inexpedient to plead the general issue, for the effect is to give the plaintiff the opening and reply.

(s) As to the policy of pleading the general issue with this plea, see the last preceding note.

(t) Where the justification is local, the defendant ought to plead in the county where the matter of justification arose, see *Craft v. Boute*, 1 Saund. 247, 1 Will. Saund. 247, note 1, and at common law the case ought to be tried there. But a trial in a different county is aided by the st. 16, 17 C. 2, c. 8. Vol. I. p. 476.

(u) As to the description of the felony with reference to the alleged slander see vol. I. 478.

(x) As to the necessity for confessing the speaking of the words, see vol. I. 475.

he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

15. *Plea of Justification of Words of Perjury.*

BECAUSE, he says, that before the speaking and publishing of the said words, of and concerning the said plaintiff, in the said ——— counts mentioned, to wit, on, &c. at, &c. at the assizes then and there holden before ———, then Chief Justice of our said Lord the King, assigned to hold pleas before the King himself, and ———, then one of the Justices of our said Lord the King, assigned to hold pleas before the King himself, justices of our said Lord the King, appointed to take the assizes for the said county, according to the form of the statute in such case made and provided, a certain issue before then duly joined in an action brought and prosecuted in the court of our said Lord the King, ——— and his companions, then Justices of our said Lord the King, of the bench at Westminster, in the county of Middlesex, by and at the suit of one ———, as the plaintiff, against one ———, as the defendant, for a supposed breach of certain promises and undertakings, alleged by the said ——— to have been made to him by the said ———, and not performed, came on to be tried in due form of law, and was then and there tried by a jury of the country in that behalf, duly taken and sworn between the parties aforesaid, and upon such trial of the said issue, the said plaintiff appeared as a witness for and on behalf of the said ———, the plaintiff in the said action, and the said plaintiff was then and there in [*402] open court at the said assizes, holden as aforesaid, before the said ——— and ———, the Justices aforesaid duly sworn, and took his corporal oath upon the holy gospel of God, to speak the truth, the whole truth, and nothing but the truth, touching and concerning the matters in question in the said issue, (they the said ——— and ———, there having sufficient and competent power and authority to administer the said oath to the said plaintiff in that behalf,) and upon the said trial of the said issue, certain questions then and there became and were material, to wit, whether, &c. (*here state the questions according to the fact, and as they relate to the charge of perjury against the plaintiff,*) and the said defendant further says, that the said plaintiff being so sworn as aforesaid, upon his oath aforesaid, then and there, to wit, on, &c. aforesaid, at, &c. aforesaid, falsely wickedly, wilfully, maliciously, and corruptly, and by his own act and consent, did say, depose, swear, and give in evidence, amongst other things, at and

upon the said trial, to and before the said jurors so sworn to try the said issue as aforesaid, and the justices aforesaid, that, &c. (*here state that part of the plaintiff's evidence in which he committed the perjury.*) whereas in truth and in fact, &c. (*here negative the plaintiff's evidence as in an indictment for perjury*) and the said plaintiff did thereby, in the said court, at the said assizes so holden as aforesaid, upon his said oath upon the trial of the said issue, falsely, wickedly, wilfully, and corruptly, commit wilful and corrupt perjury, wherefore the said defendant, at the said several times, when, &c. in the said ——— counts mentioned, at, &c. aforesaid, spoke and published of and concerning the said plaintiff the several words in the said ——— counts mentioned to have been spoken and published by him the said defendant, of and concerning the said plaintiff, as it was lawful for him to do for the cause aforesaid. And this, &c. (*as in precedent 14.*)

*16. *Plea of Justification to a Declaration for a Libel on a Dissenting Minister, charging him with having uttered personal Invectives from the Pulpit against a third person (y).*
[403]

THAT before and at the time of the speaking and publishing of the several scandalous words by the said plaintiff, as hereinafter mentioned, one Margaret Fair did assist in the management and conduct of a certain Sunday School, and was a person of distinguished merit and spotless reputation, and that the plaintiff, well knowing the premises, before the several times of printing and publishing the several supposed libels by the defendants, as in the declaration mentioned, to wit, on the 6th of April, 1823, at Great Marlow aforesaid, just before his preaching and delivering a certain discourse or sermon, then and there by him, as such pastor or minister addressed to a certain congregation of the said dissenters, assembled for the purpose of (amongst other things) hearing the said discourse or sermon, in a certain chapel, and whilst he the plaintiff was officiating in the said chapel as pastor or minister, spoke and published, from a certain part or station of the chapel, assigned to him as pastor or minister for the preaching and delivering of the discourse or sermon, and to and in the presence of the congregation,

(y) See *Edwards v. Bell*, 1 Bingham 403. On a motion for judgment for the plaintiff non obstante veredicto, the plea was held to be an answer to the declaration.

of and concerning the said Margaret Fair, these scandalous words following:—"I have something to say which I have thought of saying some time, namely, the improper conduct of one of the female teachers; her name is Miss Fair, her conduct is a bad example and disgrace to the school, and if any of the children dare ask her to go home, she shall be turned out of the school and never enter it again. Miss Fair does more harm than good." And thereby then and there gave great offence to divers of the said dissenters, to wit, one *Joseph Wright, the elder, one, &c., and occasioned a serious misunderstanding amongst the said dissenters in [*404] the declaration mentioned. Wherefore the said defendants did afterwards, to wit, at the several times, &c., in the declaration mentioned, print and publish the supposed libels in the declaration mentioned, as they lawfully might for the cause aforesaid, which are the same printing and publishing the supposed libels in the declaration mentioned, and this they are ready to verify, wherefore they pray judgment, if the said plaintiff ought to have or maintain his aforesaid action thereof against them, &c. *There were other pleas to the same effect.*

17. *General Replication de injuria, &c. to Pleas of Justification.*

AND as to the said pleas of the said defendant by him secondly and thirdly above pleaded, the said plaintiff saith that he, by reason of any thing by the said defendant in those pleas above alleged, ought not to be barred from having and maintaining his aforesaid action against the said defendant, in respect of the said grievance in the said declaration mentioned (*or in the said first and second counts mentioned; or in the introductory parts of the said second and third pleas mentioned,*) because he saith that the said defendant, at the said times, when, &c., in the said declaration (*or in the said first and second counts, or either of them, or in the introductory parts of the said second and third pleas, or either of them,*) mentioned of his own wrong, and without the cause by him the said defendant in his said second and third pleas, or either of them mentioned, did commit the said grievances (*a*) in the said declaration (*or first and second counts, or introductory parts of the said second and third pleas,*) *mentioned, in manner and form as the [*405] said plaintiff hath above thereof complained against him the said defendant, to wit, at, &c. And this he the said plaintiff prays may be inquired of by the country, &c.

(a) Formerly it was usual to repeat the words in the replication, see *Croft v. Boite*, 1 Saund. 244, but this is wholly unnecessary.—See 1 Will. Saund. 244, a. note (7).

18. *Information, by the Attorney-General, for a Libel against a Foreign Potentate (b).*

THAT before and at the times of the printing and publication of the scandalous, malicious, and defamatory libels and libellous matters and things after mentioned, there subsisted, and now subsists friendship and peace between our Sovereign Lord the King and the French Republic, and the subjects of our said Lord the King and the citizens of the said Republic; and that before and at those times, citizen Napoleon Bonaparte was and yet is First Consul of the said French Republic, to wit, at the parish of St. Anne, within the liberty of Westminster, in the county of Middlesex; and that Jean Peltier, late of Westminster, in the county of Middlesex, gentleman, well knowing the premises aforesaid, but being a malicious and ill disposed person, and unlawfully and maliciously devising and intending to traduce, defame, and vilify the said Napoleon Bonaparte, and to bring him into great hatred and contempt, as well among the liege subjects of our said Lord the King, as among the citizens of the said Republic, and to excite and provoke the citizens of the said Republic, by force of arms to deprive the said Napoleon Bonaparte of his consular office and magistracy in the said Republic, and to kill and destroy the said Napoleon Bonaparte, and also unlawfully and maliciously devising as much as in him, the said Jean Peltier, lay, to interrupt, disturb, and destroy the friendship and peace subsisting between our said Lord the King and his subjects, and

[*406] the said Napoleon Bonaparte, the French Republic, and the citizens of the same Republic, and to excite animosity, jealousy, and hatred in the said Napoleon Bonaparte against our said Lord the King and his subjects, on the 16th day of August, in the forty-second year of the reign of our Sovereign Lord George the Third, by the grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith; at the parish of St. Anne, within the liberty of Westminster, in the county of Middlesex, unlawfully and maliciously did print and publish, and cause and procure to be printed and published, a most scandalous and malicious libel, in the French language, of and concerning the said Napoleon Bonaparte, that is to say, one part thereof to the tenor following, that is to say, “*Le 18 Brumaire, An viii. Ode attribuée à Chenier,*

“*Quelles tempêtes effroyables*

“*Grondent sur les flots déchainés,*” &c.

And in another part thereof to the tenor following, that is to say,

“*Déjà dans sa rage insolente,*” &c.

(b) This was the form used in Peltier's Case. *Supra* vol. II. p. 218.

Which said scandalous and malicious words, in the French language, first above mentioned and set forth, being translated into the English language, were and are of the same signification and meaning as these English words following, that is to say, "What frightful tempests growl on the unchained waves, &c.

And which said scandalous and malicious words secondly above mentioned and set forth, being translated into the English language, were and are of the same signification and meaning as these English words following, that is to say, "Already," &c.

Second Count — That the said Jean Peltier so being such person as aforesaid, and unlawfully and maliciously devising and intending as aforesaid, afterwards, to wit, on the 26th of August, in the forty-second year of the reign aforesaid, at the parish of St. Aune, in the liberty of Westminster, in the county of Middlesex, unlawfully and maliciously did print and publish, and cause and procure to be printed and published, a certain other scandalous and malicious libel, containing therein among other things, divers other [*407] scandalous and malicious matters, in the French language, of and concerning the said Napoleon Bonaparte, in the form of an address to the French people, according to the tenor following, that is to say, "Citoyens," &c. Which said scandalous and malicious words, in the French language, last before mentioned and set forth, being translated into the English language, were and are of the same signification and meaning as these English words following, that is to say, "Citizens," &c. To the great scandal, disgrace, and danger of the said Napoleon Bonaparte, to the great danger of creating discord between our said Lord the King and his subjects and the said Napoleon Bonaparte, the French Republic, and the citizens of the said Republic, in contempt of our said Lord the King and his laws, to the evil example of all others in the like case offending, and against the peace of our said Lord the King, his crown, and dignity. Whereupon the said Attorney-General of our said Lord the King, who for our said Lord the King in this behalf prosecuteth for our said Lord the King, prayeth the consideration of the court here in the premises, and that due process of law may be awarded against him the said Jean Peltier in this behalf, to make him answer to our said Lord the King touching and concerning the premises aforesaid (a).

19. *Indictment for uttering Seditious Words.*

THAT A. B. late of, &c., labourer, being a wicked, seditious, and evil-disposed person, and greatly disaffected to our said Lord the

(a) The information contained three other counts.

King, and contriving and intending the liege subjects of our said Lord the King to incite and move to hatred and dislike of the person of our said Lord the King, and of the government established within this realm, on, &c., with force and arms, at, &c., in the presence and hearing of divers liege subjects of our said Lord the King, maliciously, unlawfully, wickedly, and seditiously did [*408] publish, utter, and *declare with a loud voice, of and concerning our said Lord the King, these words following, that is to say, " His Majesty, George the Third, (meaning our said Lord the King,) is ****, thank God for it; I (meaning the said A. B.) hope he (meaning our said Lord the King,) will soon be no more; damnation to all royalists," to the great scandal of our said Lord the King, in contempt of our said Lord the King and his laws, to the evil and pernicious example of all others in the like case offending, and against the peace, &c.

Second Count.—And the jurors, aforesaid, &c. That the said A. B. being such wicked, seditious, and evil disposed person as aforesaid, and greatly disaffected to our said Lord the King, and contriving and intending the liege subjects of said Lord the King to incite and move to hatred and dislike of the person of our said Lord the King, and the government established within this realm, on, &c., with force and arms, at, &c. unlawfully, wickedly, maliciously, and seditiously, in the presence and hearing of divers liege subjects, of our said Lord the King, again did publish, utter, and declare of and concerning our said Lord the King, and his good, true, and faithful subjects, these words following, that is to say, " I (meaning the said A. B.) hope King George the Third (meaning our said Lord the King,) will soon be no more; damnation to all royalists." (*Conclusion as before.*)

20. *Information for Writing and Publishing a Libel against the King and Government.*

THAT I. H., late of London, clerk, being a wicked, malicious, seditious and ill-disposed person, and being greatly disaffected to our said Lord the King, and to his administration of the government of this kingdom, and the dominions thereunto belonging, and wickedly, maliciously, and seditiously contriving, devising, and intending to stir up and excite discontent and sedition among his Majesty's subjects, and to alienate and withdraw the affection, [*409] fidelity, and allegiance of his Majesty's subjects from his said Majesty, and to insinuate, and cause it to be believed, that divers of his said Majesty's innocent and deserving sub-

jects had been inhumanly murdered by his said Majesty's troops in the province, colony, or plantation of the Massachusetts Bay, in New England, in America, belonging to the crown of Great Britain, and unlawfully and wickedly to seduce and encourage his Majesty's subjects in the said province, colony, or plantation, to resist and oppose his said Majesty's government, on, &c., with (c) force and arms, at (d), &c., wickedly, maliciously (e) and seditiously did write and publish (f), and cause and procure to be written and published, a certain false (g), wicked, malicious, scandalous, and seditious libel (h), of and concerning his said Majesty's government, and the employment of his troops, according to the tenor and effect (i) following:

"King's Arms-Tavern, Cornhill, June 7, 1775.

"At a special meeting this day of several members of the Constitutional Society, during an adjournment, a gentleman proposed, that a subscription should be immediately entered into by such of the members present who might approve the purpose, for raising the sum of one hundred pounds, to be applied to the relief of the widows, orphans, and aged parents of our beloved American fellow-subjects, who, faithful to the character of Englishmen, preferring death to slavery, were, for that reason only, inhumanly murdered by the King's (meaning his Majesty's) (k) troops at Lexington and Concord, in the province of Massachusetts, (meaning the said province, colony, or plantation of the Massachusetts Bay, in New-England, in America,) on the nineteenth of last April; which sum being immediately collected, it was thereupon [*410] resolved, that Mr. H. (meaning himself the said I. H.) do pay to-morrow into the hands of Messrs. B. and C. on account of Dr. F. the said sum of one hundred pounds; and that Dr. F. be requested to apply the same to the above mentioned purpose.

I. H."

(Meaning himself the said I. H.) In contempt of our said Lord the King, in open violation of the laws of this kingdom, and against the peace, &c.

Second Count.—That the said I. H. being such person as aforesaid, and again unlawfully, wickedly, maliciously, and seditiously

(c) This allegation is unnecessary, see 7 T. R. 4.

(d) As to the venue, see vol. II. p. 302.

(e) As to this averment, see vol. II. p. 303. Sty. 392. 1 Vin. Ab. 33.

(f) Supra vol. I. p. 358. Baldwin v. Elphinstone, Bl. R. 1037.

(g) This allegation need not be proved, see 7 T. R. 4, and supra vol. II. p. 403.

(h) See vol. I. p. 358.

(i) See vol. I. p. 364.

(k) As to the nature and use of an innuendo, see vol. I. p. 418.

devising, contriving, and intending as aforesaid, to wit, on, &c., with force and arms, at, &c. wickedly, maliciously, and seditiously printed and published, and caused and procured to be printed and published, in a certain newspaper, entitled, "The Morning Chronicle and London Advertiser," a certain other false, wicked, scandalous, malicious, and seditious libel, of and concerning his said Majesty's government and the employment of his troops, according to the tenor and effect following, that is to say, (setting out the libel as before.)

Third and Fourth Counts.—For publishing the same in other newspapers.

Fifth Count.—Wickedly, maliciously, and seditiously did print and publish, and cause and procure to be printed and published, a certain other false, wicked, malicious, scandalous, and seditious libel, of and concerning his said Majesty's government and the employment of his troops, according to the tenor and effect following, that is to say, (as before.)

Sixth Count.—For printing and publishing the former part of the libel.

Seventh Count.—And the said Attorney-General of our said Lord the King for our said Lord the King further gives the court here to understand and be informed, that the said I. H. being such person as aforesaid, and again unlawfully, wickedly, maliciously, and seditiously contriving, devising and intending as aforesaid, afterwards, [*411] to wit, on, &c. with force and arms, at, &c., wickedly, maliciously, and seditiously, did write and publish, and cause and procure to be written and published, a certain false, wicked, scandalous, malicious, and seditious libel, of and concerning his said Majesty's government and the employment of his troops, according to the tenor and effect following:—"I (meaning himself the said I. H.) think it proper to give the unknown contributor this notice, that I (again meaning himself the said I. H.) did yesterday pay to Messrs. B. and C. on the account of Dr. F. the sum of fifty pounds, and that I (again meaning himself the said I. H.) will write to Dr. F. requesting him to apply the same to the relief of the widows, orphans, and aged parents of our beloved American fellow-subjects, who, faithful to the character of Englishmen, preferring death to slavery, were, for that reason only, inhumanly murdered by the king's (meaning his said Majesty's) troops, at or near Lexington and Concord, in the province of Massachusetts, (meaning the said province, colony, or plantation of the Massachusetts Bay, in New-England, in America,) on the nineteenth of last April. I. H." (Again meaning himself the said I. H.)—(Conclusion as before)(i).

(i) The original, see Cowp. 683, contains other counts stating the printing

21. *Indictment for Writing and Delivering a Challenge at the instance of a third Person.*

THAT A. B., late of, &c., Esq., on, &c. at, &c., being of a turbulent, wicked, and malicious disposition, and intending to procure great bodily harm and mischief to be done to C. D., late of, &c., in the county aforesaid, Esquire, and also intending, as much as in him the said A. B. lay, to incite and provoke the said C. D. unlawfully to fight a duel with and against one *E. [*412] F. late of the same place, Esquire, on the said second day of December, in the year aforesaid, with force and arms, at B. aforesaid, in the county aforesaid, did unlawfully, wickedly, and maliciously write, and cause to be written, a certain paper-writing, in the words, letters, and figures following, to wit. "To C. D., Esquire, at B. (meaning the said C. D.) by the desire of Mr. E. F. (meaning the said E. F.) I (meaning himself the said A. B.) wait on you (meaning the said C. D.) to inform you (meaning the said C. D.) that he (meaning the said E. F.) expects such satisfaction as one gentleman should require from another, for an insult bestowed on him; your (meaning the said C. D.'s) conduct merits every treatment a scoundrel deserves. Manner, time, and place left to you (meaning the said C. D.) A. B. Dec. 2." (Meaning and intending by the said paper writing a challenge to the said C. D. to fight a duel with and against the said E. F.) which said paper-writing (meaning and intending the same as such challenge as aforesaid,) he the said A. B. afterwards, to wit, on the same day and year aforesaid, at B. aforesaid, in the county aforesaid, unlawfully, wickedly, and maliciously did deliver, and cause to be delivered, to the said C. D. against the peace, &c.

Second Count—for delivering a written Challenge as from, and on the part, and by the desire of E. F.

THAT the said A. B. being such evil disposed person and disturber of the peace of our said Lord the King, as aforesaid, and intending to procure great bodily harm and mischief to be done to the said C. D., and to incite and provoke him the said C. D. unlawfully to fight a duel with and against the said E. F., afterwards, to wit, on the same day and year aforesaid, with force and arms, at B., aforesaid, in the county aforesaid, did unlawfully, wickedly, and maliciously deliver, and cause to be delivered, a certain written challenge, as from, and on the part, and by the desire of the said E. F., to the said C. D. unlawfully to fight a duel with and against

and publishing of the latter libel in different newspapers, and also the publishing of both on different days.

the said E. F., which said last-mentioned challenge is
 [*413] *as follows, that is to say, (*set out the challenge,*) against
 the peace of our said Lord the King, his crown and
 dignity.

Third Count—for provoking and inciting the Prosecutor to Fight.

THAT the said A. B. being such evil-d'sposed person, and disturber of the peace of our said Lord the King, as aforesaid, and intending to procure great bodily harm and mischief to be done to the said C. D. and to incite and provoke him the said C. D. unlawfully to fight a duel with and against the said E. F. afterwards, to wit, on the same day and year aforesaid, with force and arms, at B., aforesaid, in the county aforesaid, did unlawfully, wickedly, and maliciously provoke and incite the said C. D. (in the peace of God and our said Lord the King then and there being,) unlawfully to fight a duel with and against the said E. F., against the peace, &c.

22. *Information for Challenging and Posting.*

THAT A. B., late of, &c. Esquire, being a person of a turbulent, wicked, and malicious disposition, and not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, and wickedly and maliciously intending, as much as in him lay, not only to terrify and affright one C. a good and peaceable subject of our said Lord the King, but also to kill and murder him, heretofore, to wit, on, &c. with force and arms, at, &c. unlawfully and wickedly did provoke and challenge the said C. to fight a duel against him the said A. B. with sword and pistol; and the said
 — of our said Lord the King, giveth the Court here further to understand and be informed, that the said C. having then and there refused to fight with the said A. B. in pursuance of such wicked and unlawful challenge last aforesaid, he the said A. B.
 [*414] for the *completing his aforesaid evil and wicked purpose and design, and further to provoke and incite the said C. to fight a duel against him the said A. B. in the manner aforesaid, afterwards, to wit, on the same day and year aforesaid, at C. aforesaid, in the county aforesaid, did wickedly and maliciously place, stick up, and upon, and caused to be placed, stuck up, and exposed to public view, to wit, on the market-house in C. aforesaid, a certain paper writing, with the name of him the said A. B. thereunto subscribed, containing certain scurrilous and abusive matter against the said C. of the tenor following, that is to say, “*Having received (meaning thereby that the said A. B. had received,) a*

most ungentlemanlike affront from C. II. esquire, meaning the said C.) I (meaning himself the said A. B.) distinguish him (meaning the said C.) thus, that none may doubt the individual man of —, in the county of M. he (again meaning the said C.) having in the most cowardly manner refused to give me (meaning himself the said A. B.) the satisfaction due to a gentleman, I, (meaning himself the said A. B.) here in the sight and for the information of his countryman, post him, (meaning the said C.) and declare him (again meaning the said C.) to be a dirty, cowardly, insolent fool, as such, I (meaning himself the said A. B.) will ever treat him, (meaning the said C.) A. B. of B. in the county of M." to the great damage and terror of him, the said C. II. and against the peace of our said Lord the King, his crown and dignity.

23. Indictment for Drawing in Effigy the Collectors of the Assessed Taxes, in pursuance of a Conspiracy.

THAT A. B. late of &c. labourer, C. D. late of the same place, labourer, &c. being respectively persons of evil, envious, and wicked minds, and of most malicious dispositions, and maliciously and unlawfully devising *and intending to injure and [*415] aggrieve one E. F. gentleman, then and there being an officer and person engaged and employed in certain business relating to the revenue of our said Lord the King, to wit, an inspector of the duties on horses and windows, and all other duties under the management of the commissioners for managing his Majesty's affairs of taxes, by several acts granted to his Majesty, and G. H. then and there being an officer and person engaged and employed in certain business relating to the revenue of our said Lord the King, to wit, an officer for the survey and inspection of the several and respective rates and duties upon horses, windows, and lights, and upon inhabited houses, and upon male servants, carriages, horses, mules, and dogs, by certain acts of parliament granted to his Majesty, and for viewing and numbering the several lights or windows in each house, and inspecting and examining the assessment or certificate thereof, made or to be made according to the direction of certain acts of parliament, and for doing all other matters by the statutes in such case made and provided, requisite to be done by an officer of that nature, in the county of —, being respectively good, peaceable, and well-disposed subjects of our said Lord the King, and to bring them into great contempt, infamy, hatred, and disgrace, on, &c. with force and arms, at, &c. unlawfully and maliciously did conspire, combine, confederate, and agree among themselves, and together with divers other evil disposed persons, whose names are unknown to the jurors

aforesaid, to traduce, defame vilify, and bring into public hatred, ridicule, and contempt, the said E. F. and G. H. as such officers as aforesaid, and to make, and cause to be made, a great noise, riot, rout, tumult, and disturbance, at, &c. ; and that the said A. B, &c. in pursuance of and according to the conspiracy, combination, confederacy, and agreement as aforesaid before had, afterwards, to wit, on, &c. with force and arms, at, &c. unlawfully and maliciously did put and place, and cause and procure to be put and placed, two figures or effigies, the said effigies or figures being intended to represent the said E. F. and G. H. in a certain cart ; and

[*416] then and there unlawfully did *by and with a certain horse, draw, and cause to be drawn, the said cart with the said effigies so put and placed therein, and exposed to public sight and view, in, through, and along divers public streets and common highways there, and also before and near the dwelling-house of the said E. F. and dwelling-houses of divers liege subjects of our said lord the king there situate, and in the presence, sight, and view of divers liege subjects of our said lord the king, in the manner in which criminals are usually conveyed to the place of execution ; and did then and there, during all that time, toll, and cause to be tolled, a certain large bell of and belonging to a certain church at ———, and made and caused to be made a great noise, riot, rout, and tumult, and disturbance and utter and cause to be uttered divers malicious and opprobrious words and speeches, defaming and vilifying the said E. F. &c. and among others the opprobrious words and speeches following, that is to say, “ Damn the dog taxers, (meaning, &c.) damn the window peepers (meaning, &c.) ;” and beat and cause to be beaten the heads and faces and other parts of the said effigies and figures, and did afterwards, to wit, on, &c. at, &c. cast and throw the said effigies or figures into a certain river or stream of water, to denote and represent the death and drowning of them the said, &c. and did then and there, immediately after such casting and throwing, ring, and cause to be rung, divers bells in and belonging to a certain church at, &c. in the manner in which the said bells were used to be rung on joyful occasions ; and did afterwards, to wit, on, &c. at, &c. compose, write, and publish, and cause and procure to be composed, written, and published, a certain malicious and scandalous libel, containing, amongst other things therein, divers scandalous and malicious matters and things, of and concerning the said, &c. to the tenor and effect following, that is to say, “ These two unfortunate malefactors (meaning, &c. were drawn to the place of execution, attended by that able priest, J. W. ; on their arrival, E. F. (meaning, &c.) stood up, and with uplifted hands addressed the spectators as follows,—

[*417] fellows, you have now presented to *your view, one of the most unfortunate of men, (meaning, &c.) whose villainy

has brought him to the most detestable of all deaths! I (meaning, &c.) have been the bane of social comfort to many: you now see the consequences of incorrigible roguery; I (meaning, &c.) have rid numbers of the golden dropsy which subsists near the purse, in order to add to my own disease, which will soon terminate my existence. To what dark abyss am I hastening! to unknown regions and pains yet unfelt by me! Ah! too late do I repent; the time is come; I must answer to the call of justice; had I been just and true, half honest would have served me. I claim forgiveness of you, though I have wronged you all alike, with this my vile associate, (meaning, &c.) partner of my villainies,—sharer of my gains; words are wanting to convince you how my conscience goads me; Heaven has now poured down curses on my head.' N. B. This speech was answered by some pretty loud huzzas. The other miscreant (meaning, &c.) then stood up, and with most beastly howl thus addressed the delighted spectators,—'Ungrateful wretches you now behold a man (meaning, &c.) in the face of death, whose courage dares to call you by your proper titles. You say, I am of notorious ploughshare and buckle memory. Yes, I am (meaning, &c.); my conduct as such commanded your esteem; I (meaning, &c.) took but 20s. and gave you two; but I am now foiled in my attempt to strip you of all within your shallow purses. With an eternal chaos before my eyes, I tell you, we (meaning, &c.) have shared £1500; this I say, to gripe your empty pockets. Had we (meaning, &c.) lived, your persons should have been in pawn to glut our empty coffers. Now farewell, we shall meet anon, to compliment each other on our rogueries. I (meaning, &c.) bid you all farewell.' This hardened villain's (meaning the said, &c.) speech was answered by much hissing and clapping of hands. They (meaning, &c.) were then drowned, drawn, quartered, and dissected; the joyful ceremony was finished by bell ringing, and the sudden transition of every one's countenance from that of a melancholy to a joyful aspect. Jewmy the priest, endeavoured to convert them by *sundry hard blows and divers bruises. [*418] Long live the king."—To the great scandal, infamy, and damage of the said, &c. to the evil example of all others, and against the peace of our said lord the king, his crown and dignity.

2nd Count.—And the jurors aforesaid, on their oath aforesaid, do further present, that the said, &c. being respectively such persons as aforesaid, and maliciously and unlawfully devising and intending to injure and aggrieve the said, &c. then and there being respectively good, peaceable, and well-disposed subjects of our said Lord the King, and to bring them into great contempt, infamy, hatred, and disgrace on, &c. with force and arms, at, &c. unlaw-

fully and maliciously did conspire, combine, confederate, and agree among themselves, and with divers other evil-disposed persons whose names are unknown to the jurors aforesaid, to traduce, defame, vilify, and bring into public hatred, ridicule, and contempt, the said, &c. and the characters and conduct of them the said, &c. respectively, and to make, and cause to be made, a great noise, riot, rout, tumult, and disturbance, at, &c. aforesaid; and that the said C. D. &c. in pursuance of and according to the said conspiracy, combination, confederacy, and agreement, so as aforesaid had, afterwards, to wit, on, &c. with force and arms, at, &c. aforesaid, unlawfully and maliciously did put and place, and cause and procure to be put and placed, &c. (*as in first count.*)

2d Count.—Intending to injure the said, &c. as such officers, as aforesaid, &c. and to make, and cause to be made, a great noise, &c. (*as before in first count.*) unlawfully and maliciously did put and place, &c. (*as in the first count, but more generally, and omitting all the opprobrious words, except damn the dog taxers and window peepers.*)

4th Count.—Same as third, except in the description of E. F. &c. as officers.

*23. *Indictment for a Libel on an Individual.*

THAT C. D. late of —, being a person of an envious, evil, and wicked mind, and of a most malicious disposition,
 [*419] and wickedly, maliciously, and unlawfully minding, contriving and intending, as much as in him lay, to injure, oppress, aggrieve, and vilify the good name, fame, credit, and reputation of A. B. a good, peaceable, and worthy subject of our said Lord the King, and to bring him into public scandal, hatred, infamy, and disgrace, (*or into public scandal, contempt, ridicule, and disgrace, &c. according to the nature of the libel,*) with force and arms, on, &c. at, &c. of his great hatred, malice, and ill-will towards the said A. B. wickedly, maliciously, and unlawfully, did compose and write, and cause and procure to be composed and written, a certain false, scandalous, malicious, and defamatory libel, of and concerning the said A. B. containing the false, scandalous, malicious, and defamatory words and matter following, of and concerning the said A. B., that is to say, (*set out a copy, with proper innuendoes to explain the meaning, if they be necessary,*) which said scandalous, malicious, and defamatory libel, he the said C. D. afterwards, to wit,

on, &c. at, &c. wickedly, maliciously, and unlawfully did send (a) and cause to be sent to one E. F. in the form of a letter, directed to the said E. F. and did thereby then and there unlawfully, wickedly, and maliciously publish, and cause to be published, the said libel, to the great damage, disgrace, scandal, and infamy of the said A. B. and against the peace, &c.

2nd Count.—That the said C. D. being such envious, evil, wicked, and malicious person, and wickedly, maliciously, and unlawfully minding, contriving, and intending, as aforesaid, to wit, on the same day and year aforesaid, with force and [*420] arms, at, &c. of his great hatred, malice, and ill-will towards the said A. B. wickedly, maliciously, and unlawfully did write (or print) and publish, and cause and procure to be written (or printed) and published a certain other false, scandalous, malicious, and defamatory libel, of and concerning the said A. B. containing the false, scandalous, malicious, and defamatory words and matter following, of and concerning the said A. B. that is to say, (*set out the libel and conclude as before.*)

3rd Count.—For publishing generally.

24. *Indictment for exposing to Sale and Public View an obscene print (b).*

THAT A. B. late of, &c. being a scandalous and evil disposed person, and not having the fear of God in his heart, but devising, contriving, and intending the morals as well of youth as of divers other liege subjects of our said Lord the King, to debauch and corrupt, and to raise and create in their minds inordinate and lustful desires, on, &c. with force and arms, at, &c. in a certain open and public shop of him the said A. B. there situate, unlawfully, wickedly, maliciously, and scandalously, did publish, sell, and utter to one C. D. a liege subject of our said Lord the King, a certain lewd, wicked, scandalous, infamous, and obscene print, on paper, entitled ———, representing, &c. (*as in the print.*) and which said lewd,

(a) Where the libel merely reflects on a person in his profession, trade, or business, and the publication is confined to that person, it is not sufficient to aver an intention to disparage and injure the party in his profession, trade, or business; the indictment ought to allege an intent to provoke and excite the prosecutor to a breach of the peace. *R. v. Wegener*, 1 Starkie's C. 543; *supra* vol. II., 324.

(b) As to this offence, see vol. II. p. 155.

wicked, scandalous, infamous, and obscene print, on paper, was contained in a certain printed pamphlet, then and there uttered and sold by him the said A. B. to the said C. D. entitled ———, to the manifest corruption and subversion of youth, and other liege subjects of our said Lord the King, in their manners and conversation, in contempt of our said Lord the King and his laws, and against the peace, &c.

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